SUPREME COURT, U. S.

JUL 2 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1963

FREDERICK F. PORDUM,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK and EWALD B. NYQUIST, the Commissioner of Education of the State of New York, and the CITY SCHOOL DISTRICT OF THE CITY OF LACKAWANNA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Board of Regents of the State of New York and Ewald B. Nyquist, the Commissioner of Education of the State of New York, and the City School District of the City of Lackawanna,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Frederick F. Pordum prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 491 F. 2d 1281 (1974). It is reprinted in Appendix "A" *infra*. The opinion of the United States District Court, Northern District of New York, is reported at 357 F. Supp. 222 (1973); it is reprinted in Appendix "B," *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 20, 1974, and a timely petition for rehearing was denied on April 4, 1974, Appendix "C," *infra*. This court has jurisdiction under 28 U.S.C. §1254(1).

Questions Presented.

1. Did the United States Court of Appeals for the Second Circuit err in affirming the dismissal of the instant action for lack of jurisdiction on the basis of failure to raise a substantial constitutional claim within the meaning of this Court's decision in *Goosby vs. Osser*, 409 U. S. 512, 518 (1973)?

2. Even if petitioner's claim did not entitle him to the convening of a three-judge court, did his complaint, which alleged a denial of due process and equal protection by reason of the failure of respondents to accord him any type of pre-suspension hearing, state a cause of action which could not be summarily dismissed by the lower courts?

Constitutional and Statutory Provisions Involved.

This case involves New York State *Education Law* §305(7), 28 U.S.C. §§ 2281 and 1343(3), 42 U.S.C. §1983, and the First and Fourteenth Amendments to the United States Constitution. These and all other relevant statutes are reprinted in Appendix "D" *infra*.

Statement of the Case.

A. Background.

Petitioner Frederick F. Pordum is a tenured teacher in the Lackawanna, New York, school system. He holds a New York State teaching certificate issued by the Commissioner of Education of New York State. In 1967, Pordum requested and received a two-year leave of absence from the respondent school district, and this leave was subsequently extended for an additional three years, to expire on January 1, 1973. In June of 1971, while Pordum was a member of the Erie County Legislature, he was convicted in the United States District Court, Western District of New York, of the crime of conspiracy to promote and facilitate the promotion of bribery of public officials, a felony under 18 U.S.C. §371. He was sentenced to serve three years in prison.

On December 22, 1972, Pordum was released on parole from prison. He wrote to the Lackawanna school system on December 29, stating that his leave of absence was about to expire and that he was ready to resume teaching. By letter dated January 24, 1973, the school district informed petitioner Pordum that it had assigned him to Wilson Elementary School, effective February 1, 1973, as a classroom teacher.

On January 24, 1973, the Commissioner of Education wrote to Pordum, ordering him to show cause on February 15, 1973, at a hearing why his teaching certificate should not be revoked. The Commissioner stated in the letter that he was acting pursuant to New York *Education Law* §305(7), which provides:

> "He [the Commissioner] may annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher by any authority whatever or declare any diploma issued by a state teachers college and state colleges for teachers ineffective and null as a qualification to teach a common school within this state, and he may reconsider and reverse his action in any such manner."

In a separate order dated January 24, the Commissioner ordered the Lackawanna School District not to re-employ Pordum pending the outcome of the February 15 hearing. On January 30, 1973, respondent school district informed Pordum that he would be notified by the district or by the Commissioner if and when he was to report to work.

Pordum declined to submit to the *ad hoc* hearing ordered by the Commissioner. At his request, the hearing was postponed until March 30, 1973. On March 8, he commenced this action in the United States District Court, naming the Board of Regents, the Commissioner and the City School District of the City of Lackawanna as defendants and challenging the constitutionality of New York *Education Law* §305(7). The Commissioner remains prepared to go forward with the hearing, which petitioner Pordum contests as unconstitutional. The school district, meanwhile, asserts that it is ready and willing to employ Pordum, without a hearing. Although a defendant in this lawsuit, the school district joined in petitioner's motion before the District Court for immediate reinstatement. The school district did appear at oral argument before the District Court but not before the Court of Appeals.

Petitioner Pordum contends that section 305(7) is unconstitutional in that it does not afford due process of law, is fatally vague, violates the equal protection clause,

and is overboard in the absence of regulations defining the grounds for revocation of a teaching certificate or any procedure to be followed in doing so.

B. Proceedings in the District Court, Northern District of New York.

The action was commenced on March 8, 1973, by the filing of a complaint. Summonses were served on March 15, 1973, on respondents Board of Regents, Ewald B. Nyquist, and the City School District of the City of Lackawanna.

The complaint, basing federal jurisdiction on 28 U.S.C. §§1343(3), 2281, 2284, and 42 U.S.C. §1983, alleged a deprivation of liberty and property under color of state law. In addition, petitioner Pordum's complaint alleged a potential chilling effect on protected rights under the First Amendment to the United States Constitution and a denial of equal protection of law under the Fourteenth Amendment.

Petitioner requested pursuant to 28 U.S.C. §§2281 and 2284, the convening of a three-judge federal district court to hear and determine the proceedings, a temporary, preliminary and a permanent injunction, a declaration of the unconstitutionality of section 305(7) of the *Education Law* of the State of New York, and for restitution of lost earnings, costs and attorneys' fees.

Chief Judge Foley found:

> "There is, in my judgment, sufficient precedent in the decisions of the United States Supreme Court and the New York Court of Appeals to foreclose the vagueness claim as it relates to the con-

vention of a three-judge court" [357 F. Supp. 222 (1973) at page 225].

Judge Foley, in ruling upon petitioner Pordum's claim of violation of due process, stated at page 225:

> "Thus the plaintiff it seems plain has been accorded the full range of due process rights which have been granted, in my judgment, not in an attempt to evade review of the challenged statute, but with an attitude of fairness to insure compliance with due process requirements. Therefore, I find §305(7) has not been applied in an unconstitutional manner in regard to due process notice and hearing rights. Furthermore, in light of the court rulings dealing with tenure of teachers (e.g.), *Slochower v. Board of Education*, 350 U. S. 551), state granted licenses (*Bell v. Burson, supra*), and the present statutory scheme providing for hearing procedures in the discharge of tenured teachers (Education Law §2573(5) (McKinney's Supp. 1972); Education Law §3020-a (McKinney's 1970), it would seem incongruous to assume the Commissioner would apply §305(7) in the future without affording a party the various due process protections specifically accorded in this situation. In addition, *the state courts have held a tenured teacher who does not possess a certificate cannot be discharged without being offered the proper hearing procedures and that lack of certificate only bears only upon the issue of incompetency as set forth in Education Law §2573(5) (supra).* (*Matter of Majnix v. the Board of Educ.* 21 N. Y. 455, 460, 288 N. Y. S. 2d 881, 235 N. E. 2d 892; *Matter of Kobylski v. Agone*, 37 Misc. 255, 263, 234 N. Y. S. 2d 907.)" (Italics supplied.)[1]

[1]The District Court's view of the requirements of Education Law §3020-a is more correct conceptually than that of the Second Circuit reliance on that section; however, to support the Commissioner's action is totally misplaced in the light of the statutory scheme (see Commissioner's Decision No. 8822

In regard to petitioner Pordum's argument of vagueness, Chief Judge Foley noted:

> "Again the argument is foreclosed by previous rulings of the United States Supreme Court. It is settled that a court should never 'anticipate a question of constitutional law in advance of the necessity of deciding it'" [at page 226].

Judge Foley summarily dismissed Pordum's equal protection argument, stating at page 226:

> "The last allegation, also contained in paragraph 20 of the complaint and apparently levied as a parting shot at the challenged section, is in my view obviously without merit. The bare allegation is made that there is a violation of the Equal Protection Clause in that other professions are treated differently and is totally conclusory in nature and unsupported by any factual allegations * * * The standard of conduct for a teacher is not unlike the standards familiarly required in the other professions and the judiciary within the State of New York, and such an unsupported allegation by bare statement will not create a substantial federal question such as to necessitate the convening of a three-judge court."

Finally Judge Foley added:

> "In my judgment, the allegations in the complaint on their face do not raise questions of sufficient federal constitutional substance to warrant

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(footnote continued)

[Colen Gardner] which is attached as Appendix "E" and which explains said scheme). For the questionable constitutionality of section 3020, see *Kinsella vs. Board of Education, et al.*, F. Supp. (W.D.N.Y. 1974), attached herewith as Appendix "F," a three-judge court decision which is now final in light of the State of New York's failure to appeal.

> the convention of the statutory three-judge court pursuant to the jurisdictional authorization of 28 U.S.C. §2281 * * * There remains the jurisdictional allegation of 28 U.S.C. §1343(3) under which there is the requirement to state a substantial constitional claim * * * The findings outlined here in that the allegations and the complaint are insubstantial for purposes of 28 U.S.C. §2281 likewise require the dismissal of the complaint as it alleges jurisdiction under 28 U.S.C. §1343(3), and the reliance on 42 U.S.C. §1983" [at page 226].

The lower court then dismissed the motions of petitioner requesting the convening of a three-judge court and denied the granting of a temporary restraining order and preliminary injunction, while dismissing the complaint for lack of jurisdiction.[2]

C. Proceedings in the United States Court of Appeals for the Second Circuit.

The United States Court of Appeals for the Second Circuit affirmed the decision of the United States District Court for the Northern District of New York. The court first noted that the lower court was correct in finding that petitioner Pordum's claim in the instant case was foreclosed by previous decisions of the Supreme Court as obviously lacking in merit and therefore not requiring the convening of a three-judge panel. *Goosby v. Osser,* 409 U. S. 512, 518 (1973).

The Second Circuit determined that petitioner Pordum's due process rights to liberty and property were not denied, because the Commissioner of Education noti-

[2]Although brought to its attention during oral argument and by petitioner's briefs, the District Court did not consider this Court's decision in *Goosby vs. Osser, supra.*

fied petitioner that a hearing would be held prior to the Commissioner's ultimate disposition on the continuation of his teaching certificate; that a hearing officer would preside; that petitioner would be allowed to present evidence, cross examine witnesses and obtain a copy of the transcript of the hearing. Although no written procedures regarding this kind of hearing were in evidence, the District Court and the Second Circuit both found that the Commissioner's determination was reviewable pursuant to the New York *Civil Practice Law and Rules*, Article 78.[3] The Second Circuit, agreeing with the lower court, determined that petitioner was not entitled to a hearing prior to his suspension without pay. It noted that governmental interests have been held sufficient to outweigh the indivdual's interest in a prior hearing.

The Court of Appeals found:

> "Appellant's vagueness claim must fail because Pordum cannot argue that he was surprised to learn that a felony conviction might bar him from teaching in the public schools in New York State" [at page 1285].

The court noted that a teacher is fairly chargeable with the knowledge that conduct which will subject him or her to five years in prison will also subject that teacher to review concerning fitness to teach.

The Court of Appeals determined that petitioner Pordum's equal protection argument must fail because even though the New York *Education Law* provided different

[3]A conclusion also of questionable constitutionality in light of the three-judge court decision in *Kinsella, supra*, and the Second Circuit's own decision in *James vs. Board of Education*, 461 F. 2d 566 (2d Cir. 1972).

standards in regulating other professions, the distinctions are justified by reason of legislative determination that different treatment with respect to the disciplining of the different professions is required. *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955).

The Court of Appeals agreed with the District Court in holding that petitioner Pordum's argument that New York State *Education Law* §305 (7) is overbroad, and thereby created an impermissible chilling effect on First Amendment rights, lacked substantiality. The Second Circuit also noted, in agreeing with the lower court:

> "* * * Judge Foley 'did not need to call on two other judges for reassurance, *Green v. Board of Elections*, 380 F. 2d 445, 452 (2d Cir. 1967), cert. denied, 389 U. S. 1048 (1968); *Nieves v. Oswald*, 477 F. 2d 1109, 1115 (2d Cir. 1973)" (at page 1286).

Finally the Court of Appeals determined:

> "Since it is clear that appellant's constitutional rights have not been violated, dismissal was proper" [at page 1287].[4]

[4]The court then added a long footnote noting this Court's rejection of irrebuttable presumptions as being disfavored under the due process clause and other factors which make, it is submitted, its affirmance of the District Court questionable.

REASONS FOR GRANTING THE WRIT.

I.

The courts below were in error in dismissing petitioner's complaint for lack of a substantial constitutional question.

When a claim is filed requesting interlocutory or permanent injunctive relief pursuant to 28 U. S. C. §2281, the judge before whom the claim is filed is required to convene a three-judge federal court by following the procedures outlined in 28 U. S. C. §2284. The district court is very limited with respect to its power to review the claim presented. In *Idlewild Bon Voyage Liquor Corporation v. Epstein, et al.*, 370 U. S. 713, 715 (1962), this Court held:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

The district court judge is not required to convene a three-judge federal court when it is *clear* that no substantial federal question is presented. The most recent explication of what constitutes an insubstantial federal question is found in *Goosby v. Osser*, 409 U. S. 512, 518 (1973), wherein this Court stated:

> "'Constitutional insubstantiality' * * * has been equated with such concepts as 'essentially fictitious' * * * 'wholly insubstantial' * * * 'obviously frivolous' * * * 'obviously without merit' * * *. *A*

> *claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'"* (Italics added.)

Thus, the two tests for determining whether a substantial federal question is lacking are whether the claim is obviously without merit and whether previous decisions of the Supreme Court have foreclosed the subject. *California Water Service Co. v. City of Redding,* 304 U. S. 252, 255 (1938). *Nieves, et al. v. Oswald,* 477 F. 2d 1109 (2d Cir. 1973).

That the questions raised herein by the merits were not insubstantial is reflected by the fact that, during the pendency of this matter in both the District Court and the Second Circuit, this Court had pending before it *Arnett v. Kennedy,* U. S. , 42 L. W. 4513 (1974); *Snead v. Dept. of Social Services,* 355 F. Supp. 764 (S. D. N. Y. 1973), judgment vacated U. S. (1974), 42 L. W. 3626; *Sanford v. Wilson* and *Collins v. Wilson,* 32 N. Y. 2d 788 (1973), judgment vacated U. S. (1974), 42 L. W. 3626. In light of this Court's opinions in *Arnett* and its vacation and remand of *Snead, Sanford* and *Collins*, it is submitted that the issues raised herein still have not "foreclosed the subject" so as to "leave no room for the inference that the question sought to be raised can be the subject of controversy." The very fact that this Court remanded in *Snead, Sanford* and *Collins* rather than affirmed as it did in *Shelton v. Equal Employment Opportunity Commission,* 357 F. Supp. 3 (W. D. Wash. 1973), aff'd U. S. , 42 L. W. 3626 (1974), obviously left open the question of the constitutional validity of the deprivations in those cases for reconsideration, if still necessary, at another time.

A. Petitioner's Claim Has Merit.

With regard to petitioner Pordum's claim, the test is not whether the claim will be successful or not, but whether it is obviously without merit. We submit that Pordum's claims have substantial merit.

Petitioner is a certified licensed school teacher in the State of New York and is tenured. As such, the petitioner has a liberty interest in preserving his teaching certificate (license) as well as his occupational or employment status. [See *Board of Regents v. Roth*, 408 U. S. 564 (1972); *Meyer v. Nebraska*, 262 U. S. 390 (1923)]. He also has a property interest [*Perry v. Sindermann*, 408 U. S. 593 (1972); *Board of Regents v. Roth, supra*], entitled to protection pursuant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The right to engage in any of the common occupations in life, to acquire useful knowledge, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men denotes a liberty protected under law. *Board of Regents v. Roth, supra; Meyer v. Nebraska, supra.* A state may not prevent a person from pursuing any occupation in a manner or for reasons contravening the due process or equal protection provisions of the Fourteenth Amendment to the United States Constitution. *Schware v. Board of Law Examiners of the State of New Mexico*, 353 U. S. 232 (1957). It is well settled that a license essential to the pursuit of a livelihood may not be taken away without the procedural due process required by the Fourteenth Amendment. [See *Bell v. Burson*, 402 U. S. 535, 539 (1971)].

In *Perry v. Sindermann, supra,* at page 601 this Court stated with respect to property:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

It is obvious that petitioner Pordum, as a licensed and tenured school teacher, has such a liberty and property interest in his license and his occupation or right of employment.

It is well settled that even a temporary, non-final deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Bell v. Burson, supra.* The respondents, particularly the Commissioner of Education, have impinged upon these interests by suspending petitioner's license to teach without a prior hearing of any kind, and by preventing the petitioner from engaging in his lawful occupation; and, on the basis of a vague and indefinite statute, by seeking to have petitioner Pordum show cause why his teaching certification should not be cancelled and annulled.[5] The Commissioner of Education has acted pursuant to the Education Law of the State of New York, and more particularly section 305(7) thereof. That aforesaid provision provides in pertinent part that the Commissioner of Education,

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[5]The respondent school district did not formally take any action to suspend Pordum, which in and of itself was a violation of law and due process. Nor did it suspend Pordum pursuant to *Education Law* §3020-a which was in effect at the time of the events complained of herein, an option noted by the District Court and assumed to have been utilized by the Second Circuit.

> "* * * may annul *upon cause shown to his satisfaction* any certificate of qualification granted to a teacher by any authority whatever * * *, and he may consider and reverse his actions in any such matter." [Italics supplied].

Petitioner contends that section 305(7) violates the due process clause of the Fourteenth Amendment to the Constitution in that it is vague and indefinite on its face, and in that it is not made more definite by other statutes, rules or regulations of the Board of Regents and the Commissioner of Education.

In *Grayned v. City of Rockford*, 408 U. S. 104 (1972), the Court noted at page 108:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."

In *Arnett v. Kennedy*, U. S. , 42 L. W. 4513 (April 16, 1974), this Court had opportunity to consider the question of statutory vagueness in regard to the standard "for such cause as will promote the efficiency of the service," found in the Lloyd-Lafollette Act, specifically 5 U S. C. §7501 (a). There the Court held in a plurality opinion that the language of a statute does not exist *in vacuo* but may be interpreted and made clear by governmental regulations or opinions of governmental

counsel (42 L. W. at page 4521, concurring opinion at page 4530). In the case at bar, there exist *no* opinions of counsel or regulations adopted to supplement *Education Law* §305 (7). Similarly in *Parker v. Levy*, U. S. , 42 L. W. 4979 (June 19, 1974), this Court has stated that statutory vagueness may be remedied by custom and usage. In the instant case, *Education Law* §305 (7) has never been utilized by the Commissioner (see page 23, *infra*). Therefore *Arnett, supra,* and *Parker v. Levy, supra,* have not foreclosed the vagueness issue; indeed, they reveal that questions of vagueness are still justiciable issues; and pursuant to this Court's mandate in *Goosby v. Osser, supra,* it must be heard by a three-judge court.

Section 305 (7) in effect proscribes the doing of any act and permits penalties to be assessed upon "cause shown to [the Commissioner's] satisfaction * * *." Men of ordinary intelligence must necessarily guess as to the meaning of that phrase and differ as to its application. As such, it fails to give adequate notice of the type of conduct that may result in loss of one's license. Furthermore, the statute does not give the Commissioner of Education adequate standards to be applied in deciding whether to invoke a penalty; and the statute does not provide a standard for judicial review of an administrative procedure. Teachers are constitutionally entitled to both notice of proscribed conduct and a standard for the imposition of penalties.

Additionally, the statute is so vague and overbroad that it unnecessarily infringes upon the basic right to academic freedom of teachers, as well as the right to engage in a common occupation of the community, deemed fundamental in *Board of Regents v. Roth, supra; Meyer v. Nebraska, supra.* As such it is in violation of the due process clause of the Fourteenth Amendment.

That *Education Law* §305 (7) is clearly unconstitutional, being void for vagueness and ambiguity, is to be seen by a comparison with other sections of the *Education Law* of the State of New York regarding the termination of tenured teachers.

Section 2509 of the *Education Law* of the State of New York, subsection 2, which governs respondent school district, provides that regarding probationary teachers recommended for tenure and approved by local boards:

> "Such persons and all others employed in the teaching service of the schools of such school district who have served the full probationary period shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause *after a hearing* as provided by section three thousand twenty-a of such law. *Failure to maintain certification as required by this chapter and the regulations of the commissioner of education shall consitute cause for removal.*" [Italics supplied.]

Thus the statute clearly makes loss of certification only a ground for removal. It does not require, as suggested by the actions of the Commissioner, that revocation of certification constitutes automatic removal.

Section 3012 of the *Education Law*, subsection 2, states in part:

> "Such persons, and all others employed in the teaching, examining or supervising service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, *after a hearing* as provided by section three thousand twenty-a of such law:

"(a) insubordination, immoral character or conduct unbecomming a teacher;

"(b) inefficiency, incompetency, physical or mental disability or neglect of duty * * *" [Italics supplied.]

"(c) *failure to maintain certification as required by this chapter and by the regulations of the commissioner of education.*" [Italics supplied.]

Similar standards and hearing procedures are embodied in sections 3013, 3014 and 2573 (subsections 4-8) of the *Education Law* of the State of New York.

Petitioner submits that section 3020-a provided far more procedural and substantive safeguards than *Education Law* §305 (7), yet section 3020-a was still found unconstitutional.[6] If this is so, it is clear that the constitutionality of *Education Law* §305 (7) presents a substantial federal question which has not been foreclosed by prior decisions of the courts.

In *Kinsella v. Board of Education, et al.*, F. Supp. , Appendix "F" herein, decided by a three-judge federal court in the Western District of New York on February 19, 1972, the day before the Second Circuit's decision herein, the court found New York *Education Law* §3020-a unconstitutional on due process grounds. The State of New York chose not to appeal this decision, but enacted remedial regulations, whose validity is being challenged in the state courts.

Education Law §305(7) is entirely devoid *of any* hearing procedure and provides in no way for the preservation of the constitutional rights of the tenured teacher as

[6]Section 3020-a is set forth herein in Appendix "D."

guaranteed by the Fourteenth Amendment. The broad assertion of *Education Law* §305(7) that the Commissioner "* * * may revoke *upon cause shown to his satisfaction* any certificate or qualification granted to a teacher by any authority whatever, or declare any diploma issued by a state teacher's college and state colleges for teachers ineffective and null as a qualification to teach in a common school within this state * * *" [italics supplied] is a grant of an arbitrary and unqualified power. That the Commissioner may also "* * * reconsider and reverse his action in any such matter" is no assurance that the rights of the teacher will be protected in accordance with the due process provisions of the Fourteenth Amendment, and is no limitation on the power of respondent Commissioner of Education.

The absence of procedural due process or any due process from *Education Law* §305 (7) is pointed up by a comparison of it with section 3020-a, even with its constitutional infirmities. Similar comparisons with provisions of the *Education Law* relating to other professions such as doctors, dentists, nurses and accountants further reveal the disparity of procedural and substantive due process accorded teachers. The bare fact that the legislature might have conceived that the professions demanded unequal treatment is no defense to the unconstitutionality alleged herein, for, in making an unequal set of laws, may not the legislature be acting unconstitutionally?

The procedural inadequacy of *Education Law* §305(7) is also made clear by a review of footnote 14 in the opinion of the Court of Appeals (491 F. 2d at p. 1287). Therein the Second Circuit cautioned the Commissioner not to make irrebutable presumptions in judging petitioner Pordum, to consider testimony from respondent

school district. Due to its lack of standards, section 305 (7) is subjective in its application. If the Second Circuit must define the limits of the Commissioner's conduct, the law is indeed vague and ambiguous. At the very least, it presents substantial questions for a court's consideration.

Since this action presents many questions of more than obvious merit, it is clear that at least one-half of the requirement of presenting a substantial federal question has been met.

B. Petitioner's Claim Has Not Been Foreclosed By Previous Decisions of the Court.

The second test to be met in determining if a substantial federal question is present, is to determine whether the case has been foreclosed by previous decisions of the court. The Supreme Court in *Goosby v. Osser, supra,* was confronted with this question and summarized the law as follows:

> "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson*, 369 U. S. 31, 33, (1962), 'wholly insubstantial,' *ibid.*, 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 288, (1910), 'obviously without merit' *Ex parte* Poresky, 290 U. S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of unconstitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. §2281. *A claim is insubstantial only if 'its unsoundness so*

> *clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'* " [at page 518]. [Italics supplied.]

The Court of Appeals for the Second Circuit has had occasion to rely on this language with respect to a determination of the issue of foreclosure by prior court decision in *Nieves, et al. v. Oswald, supra.* In *Nieves, supra,* the court emphasized that previous decisions which merely render claims of doubtful or questionable merit *do not* render them insubstantial for the purpose of 28 U. S. C. §2281. It is submitted that in order to foreclose an action under this definition because of a prior decision, both cases would almost have to be identical.

In *Roe v. Ingraham,* 480 F. 2d 102 (2d Cir. 1973), the Second Circuit commented on the very strict limitations imposed on a district court judge in dismissing a complaint seeking an injunction on the ground of unconstitutionality:

> "In the face of recent strong advocacy of the abolition of the three-judge court requirement in constitutional cases, a unanimous Supreme Court has just defined the standard permitting a single judge to dismiss a complaint seeking an injunction on the ground of unconstitutionality in the most limiting terms the court has ever used." [Citing *Goosby v. Osser, supra.*]

Petitioner Pordum herein has alleged that the specific statutes and overall statutory scheme by which the respondents purport to justify their actions are in violation of the petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment as well as the First Amendment. The petitioner is not aware of any previous decisions by the Supreme Court regarding

due process of law, freedom of speech and equal protection which "inescapably render" these "claims frivolous" or which "foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." There is and has been currently much litigation in both federal and state courts that would mitigate against such a conclusion. See, e. g., *Burton v. Cascade School District*, 353 F. Supp. 254 (D. C., Ore., 1973); *Roe v. Wade*, 410 U. S. 413 (1973); *Ward v. Village of Monroeville*, 409 U. S. 57 (1972); *Board of Regents v. Roth, supra; Carpenter v. City of Greenfield School District No. 6*, 358 F. Supp. 220, (D. Ct., E. D. Wisc., 1973); *Perry v. Sindermann, supra; Kinsella v. Board of Education of Central School District No. 7*, Case No. 73 CV 1973 (D. Ct., W. D. N.Y.) decided February 19, 1973, and discussed at page 18, *supra; Snead v. Dept. of Social Services, et al., supra.* See also *Arnett v. Kennedy* U. S. , 42 L. W. 4513 (April 16, 1974); *Gieringer v. Center School District #58,et al.*, 477 F. 2d 1164 (8th Cir. 1973), cert. den. U. S. , 42 L. W. 3195 (1973); *Acanfora v. Board of Education*, 491 F. 2d 498 (4th Cir. 1974); *Green v. Waterford Board of Education*, 473 F. 2d 629 (2d Cir. 1973); *Cleveland Board of Education v. LaFleur*, U. S. , 42 L. W. 4186 (1974); *Cohen v. Chesterfield County School Bd.*, U. S. , 42 L. W. 4186 (1974).

It is interesting to note that under New York *Education Law* §§ 2509, 3012, 3013 and 3020-a, a broad definition of the reasons for termination of employment of a tenured teacher is set forth along with specific hearing procedures which must be adhered to. This feature is non-existent in *Education Law* §305(7). An attempt to incorporate sections of the *Education Law* into section 305 (7) to remedy its due process defects must also fail,

since *Education Law* §§2509, 3012, 3013 and 3020-a relate *solely* to powers of boards of education or boards of cooperative educational services, not to the powers of the Commissioner of Education.[7]

Section 305(7) of the *Education Law* has been involved in apparently only three prior decisions of the Commissioner, *Matter of Pryor,* 38 St. Dept. Rep. 115, (1928); *Matter of Hoffman,* 39 St. Dept. Rep. 346 (1930), and *Matter of Quinn,* 67 State Dept. Rep. 7 (1946). *Matter of Quinn* is illustrative of its utilization. Herein formal charges were placed against a teacher by a superintendent of schools. The charges alleged incompetent and inefficient service, neglect of duty, conduct unbecoming a teacher and conduct prejudicial to good order, efficiency and discipline. Specifications were set forth in a bill of particulars thereafter furnished. Hearings were accorded the respondent before a trial committee of the board of education. Section 305(7) was relied upon by the Commissioner to *sustain* the board's action on appeal to him, not to empower the Commissioner to hold a hearing.

These cases illustrate a limited reliance on *Education Law* §305(7) more than twenty-seven years in the past. It is indicative that this section has been rarely, if ever utilized and *never* before by the Commissioner of Education directly. Section 3020-a and other sections of the *Education Law* have supplanted it. In fact, the District Court, in the instant case recognized that section 305(7) has been materially affected by section 3020-a of the *Education Law,* stating at 357 F. Supp. 225:

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[7]Section 305(7) was originally enacted in 1864. It is submitted that Sections 3012, 3013, and 3020(a) which have all been enacted since 1947, and Section 3020(a) as late as 1970, either repeal it by implication, modify it or make it inoperative as a practical matter.

> "Furthermore, in light of the court rulings dealing with tenure of teachers (e. g., *Slochower v. Board of Education,* 350 U. S. 551), state granted licenses (*Bell v. Burson, supra*), and the present statutory scheme providing for hearing procedures and the discharge of tenured teachers (Education Law §2573 [5] [McKinney's Supp., 1972]; Education Law §3020-a (McKinney's 1970) it would seem incongruous to assume that the Commissioner would apply §305 (7) in the *future* without affording a party the various due process protections specifically accorded in this situation." [Italics supplied.]

The Court of Appeals apparently relies on the hearing procedures of section 3020-a to remedy the lack thereof in *Education Law* §305(7). While recognizing that section 3020-a sets forth the statutory duty required of the respondent school district, it assumes compliance with the statutory requirement even in the face of no evidence in the record to support such a conclusion. In fact, the state of the record clearly suggests the contrary, the district indicating that its failure to permit Pordum to return to his teaching duties is based solely on the Commissioner's order to it.

Indeed, it would seem incongruous to assume that respondent Commissioner of Education could apply section 305(7) in any but an arbitrary manner, since hearing and other due process safeguards are *not* incorporated in that provision of the *Education Law*, nor in the rules and regulations of the New York State Education Department, nor in any previous decisions of the Commissioner of Education. While the Commissioner *might* afford petitioner Pordum a hearing, he might decide that another teacher would require no hearing. In addition, the Commissioner, as in the present case, could suspend a teacher prior to any type of hearing. Even assuming

the correctness of the District Court's assumption on the procedural due process issue, this does not overcome the substantive due process problem already described. There is no requirement that a complainant undergo an unconstitutional deprivation of his liberties before the courts will give injunctive or declaratory relief. *Steffel v. Thompson,* U. S. , 42 L. W. 4357 (March 19, 1974).

In regard to the right of a hearing prior to a deprivation of property, the Supreme Court, in *Fuentes v. Shevin,* 407 U. S. 67, 80 (1972) stated:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' *Baldwin v. Hale,* 68 U. S. 223. See *Windsor v. McVeigh,* 93 U. S. 274; *Hovey v. Elliott,* 167 U. S. 409; *Grannis v. Ordean,* 234 U. S. 385. *It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo,* 380 U. S. 545, 552." [Italics supplied.]

With respect to the question of what is a "meaningful time," the Court noted at page 81:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted *at a time when the deprivation can still be prevented.*" [Italics added.]

Accord: *Arnett v. Kennedy, supra.*

It may be argued that even if a party has been arbitrarily deprived of property, there is a remedy in dam-

ages. The Court dismissed this argument stating at page 82:

> "But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This court has not * * * embraced the general proposition that a wrong may be done if it can be undone.' *Stanley v. Illinois,* 405 U. S. 645."

The court in *Fuentes v. Shevin, supra,* recognized that due process tolerates variances in the *form* of a hearing appropriate to the nature of the case. It also stated at page 82:

> "'* * * the court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided *before* the deprivation takes effect." [Cited for example by the court are, among other cases, *Bell v. Burson,* 402 U. S. 535, 542; *Wisconsin v. Constantineau,* 400 U. S. 433, 437; *Goldberg v. Kelly,* 397 U. S. 254]." [Italics supplied.]

Accord: *Arnett v. Kennedy, supra.*

In *Boddie v. Connecticut,* 401 U. S. 371, 378-379, the Court noted that the deprivation of property prior to a hearing is only justified in "extraordinary" situations:

> "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before he is deprived of any significant interest,* except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." [Italics supplied.]

In the instant case, it is submitted that there is no valid governmental interest at stake which justifies the deprivation of petitioner Pordum's property and liberty interests (i. e., his occupation and livelihood) prior to a hearing by both the Commissioner and respondent district's board of education. Indeed the respondent City School District of the City of Lackawanna not only has always rated petitioner as a satisfactory teacher, it offered to reinstate and re-employ petitioner.

The length of time petitioner Pordum has been deprived of property and liberty is not relevant to the requirement of a hearing. In *Fuentes v. Shevin, supra,* the Court stated at page 86:

> "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind."

It would be a curious inversion of our constitutional liberties to conclude that the reasoning of *Fuentes v. Shevin, supra,* regarding several pieces of household furniture is not applicable to a citizen's property interests in pursuing a common occupation and livelihood. Indeed, this Court recognized that the value of the deprivation is unimportant when it concluded in *Fuentes v. Shevin, supra,* at page 89:

> "No doubt, there may be many gradations in the 'importance' or the 'necessity' of various consumer goods. Stoves could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions."

The court's ruling in *Mitchell v. Grant,* U. S. , 42 L. W. 4671 (May 13, 1974), does not alter this analysis. In *Mitchell, supra,* before the temporary deprivation of property was permitted by state law, a requisite showing had to be made before a judge, and judicial authorization obtained (42 L. W. at 4676). In the instant case, the temporary deprivation was initiated without even minimal due process or recourse to judicial authority. In *Mitchell* the court, a neutral body, issued authorization for the temporary deprivation; in the present case, the same party seeking revocation of a license to teach is the same party authorizing the temporary deprivation—i. e., the Commissioner of Education of the State of New York. Such a procedure raises the question of inpartiality discussed by Justice White in *Arnett v. Kennedy* and addressed by the court in *Gibson v. Berryhill,* 411 U. S. 564 (1973).

Finally, *Mitchell, supra,* at 42 L. W. 4677, determined that the facts relevant to obtaining authorization for the temporary deprivation (a writ of sequestration) were narrowly confined. In petitioner's case, the power of the Commissioner of Education is broad and unlimited by statute, rule or regulation.

Petitioner Pordum's argument before both the District Court and the Court of Appeals also concerned the question of respondent Commissioner's statutory authority to suspend petitioner from teaching. The Court of Appeals at page 1283 of its decision, at footnote two, stated:

> "Appellant contends that the Commissioner does not have the power to suspend or dismiss a teacher, only to revoke certification. This contention is questionable."

At page 1285 of its opinion, the Court of Appeals added:

> "* * * appellant contended at oral argument that the Commissioner did not have the authority to suspend him and that the school district, in obeying the unauthorized order of the Commissioner not to employ him, breached independent constitutional and statutory duties owing to appellant. This argument is based on the major premise that the Commissioner has the authority only to revoke and annul Pordum's license, not to suspend him from his teaching duties."

The court was in error in rejecting this construction of New York law. In *Matter of Lynch*, 41 App. Div. 2d 363, 343 N. Y. S. 2d 179, 182 (3rd Dept. 1973), affirmed without opinion on the basis of the Appellate Division's decision by the New York Court of Appeals, 34 N. Y. 2d 588, 354 N. Y. S. 2d 948 (1974), the court held:

> "Certification requirements, however, may not be employed to erode the protections afforded tenured teachers, since the tenure statutes provide the exclusive method for dismissal for those teachers (*Matter of Kobylski v. Agone*, 37 Misc. 2d 255, 234 N. Y. S. 2d 907, aff'd 19 A. D. 2d 761, 242 N. Y. S. 2d 630)."

See also, *Boyd v. Collins*, 11 N. Y. 2d 228, 228 N. Y. S. 2d 228 (1962). These cases clearly indicate that New York law authorizes the dismissal of tenured teachers *only* through its tenure statutes and by boards of education. And there is no power granted in the tenure statutes for the Commissioner of Education to directly affect petitioner Pordum's employment.

Under New York law, licensing and employment are separate functions. The former being the sole province of the Commissioner of Education of the State of New

York; the latter being the sole province of the local school district.

The Commissioner of Education recognized this view of his own powers regarding the licensing and employment of teachers in *Matter of Colen Gardner,* Ed. Dept. Rep. , Decision No. 8822 (May 24, 1974) (attached as Exhibit E), wherein at page 4 he stated:

> "* * * as the Appellate Division, Third Judicial Department noted in *Matter of Lynch v. Nyquist,* 41 A. D. 2d 363, aff'd N. Y. 2d , certification requirements cannot be used to erode the tenure laws, *since such statutes provide the exclusive methods for dismissal of teachers* * * * (see *Matter of Lynch v. Nyquist, supra; Matter of Mannix v. Board of Education,* 21 N. Y. 2d 455; *Matter of Glass v. Board of Education,* 21 A. D. 2d 891, aff'd 16 N. Y. 2d 982; *Matter of Feingold,* 31 A. D. 2d 969; *Matter of Kobylski v. Agone,* 37 Misc. 2d 255, aff'd 19 A. D. 2d 761).
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> "While *tenure represents the relationship between a teacher and his employer, certification represents the relationship between the teacher and the Commissioner of Education,* the state officer responsible for certification of teachers outside of the New York City and Buffalo city school districts. No school district can by its acts of omission or commission bind the Commissioner to waive certification requirements." (Italics supplied.)

This clearly shows that the Commissioner recognizes the statutory limitations on his power to directly interfere with the employment relationships between teachers and school districts. Therefore the suspension of petitioner by respondent Commissioner is in violation of New York law. For just as a school district cannot by "its acts of omission or commission bind the Commissioner to waive

certification requirements" neither can the Commissioner by his acts of omission or commission bind a school district with respect to whether it will or will not discharge or keep a teacher whose certification may have been revoked or otherwise terminated. Hence the issue of whether the Commissioner of Education deprived petitioner of property without due process of law presents a substantial federal question. At the least, even if it does not require the convening of a three-judge court, it still presents a cognizable federal issue to be determined by the District Court.

Petitioner Pordum's case should be remanded to the District Court to be reviewed in the light of this Court's decision in *Arnett v. Kennedy, supra.* In *Arnett,* a majority of the court held that a non-probationary governmental employee has, at the least, the right to some procedural due process (although less than a full evidentiary hearing) prior to a suspension without pay. Petitioner Pordum was summarily enjoined from teaching, and thus suspended without pay and given no prior notice of such suspension or of the charges preferred against him, no opportunity to reply prior to such suspension and no notice that a written decision on the answer would be made at any time. In *Arnett,* Justices Powell, Blackmun and White held that some kind of procedure was required prior to suspension without pay. Justices Marshall, Douglas and Brennan held that *any* deprivation must be accompanied by a prior full-scale evidentiary hearing. At the very least a majority court makes clear that at least *some* procedure must *precede* a suspension without pay. This decision makes it clear that the issue of suspension without pay without *any* prior proceeding is a substantial federal question that has *not* been foreclosed by prior decisions of the courts, and therefore is appropriate for consideration by a three-judge

court. *Goosby v. Osser, supra.* See also, *Morrissey v. Brewer,* 408 U. S. 471 (1972). Even the plurality opinion of Justice Rehnquist in *Arnett* does not answer the issues posed here since the statute involved herein does not define or limit the rights guaranteed to Pordum in the manner suggested by that opinion.

In the case at bar, the fact that respondent Commissioner of Education has initiated a prosecutorial course of action to deprive petitioner Pordum of his certification and has simultaneously assumed the role of judge also makes the proposed license revocation proceeding hopelessly prejudiced against petitioner. *Gibson v. Berryhill,* 411 U. S. 564 (1973). Respondent Commissioner of Education has initiated charges against Pordum, has enjoined him from teaching, and requests Pordum to show cause why his teaching certification should not be removed. These actions involving allegations of denial of basic constitutional rights present substantial constitutional issues for judicial determination.

The District Court (357 F. Supp. at 226) and Court of Appeals (491 F. 2d at 1286) state that petitioner's equal protection argument is baseless. Petitioner must respectfully disagree. In the application of the *Education Law* to other professions, the standards of due process which must be adhered to before licenses can be revoked are clear and detailed. Some examples will suffice. In *Education Law* §6509, a section covering definitions of professional misconduct, there are nine subdivisions. Misconduct is defined to include obtaining a license fraudulently, practicing the profession fraudulently beyond the authorized scope of the profession, practicing with gross incompetency or gross negligence and being convicted of committing an act constituting a crime under New York, Federal or other law. Due process considerations are em-

bodied in section 6510 covering proceedings and cases of professional misconduct. This section details prehearing procedures, hearing procedures, decision procedures, and review procedures. Even if instances of professional misconduct are alleged, it is only *after* a complaint has been made, investigated, written charges prepared, a notice of hearing sent out, and a hearing held, that the decision to revoke a license, suspend a licensee, or fire a licensee, can be made. Section 6511 of the *Education Law*, "penalty for misconduct," states:

> "The penalties which may be imposed by the board of regents on a present or former licensee found guilty of professional misconduct * * * are: (1) reprimand, (2) suspension of license, (3) revocation of license, (4) annulment of license or registration and (5) limitation on registration or issuance of any further license. Board of regents may stay such penalties and place the licensee on probation and may restore a license which has been revoked."

In the instant case, *Education Law* §305(7) mandates no hearing and fails to state any standards of conduct which are expected of teachers. The New York *Education Law*, insofar as it pertains to the misconduct proceedings of other professionals provides multiple examples of due process safeguards. Because *Education Law* §305(7) does not afford teachers the same equal protection of the law as it does to other professions, it is thus unconstitutional, or, in the least, presents a substantial constitutional question requiring the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284.

It is not enough for the lower courts to dismiss petitioner's equal protection argument with the conclusion that by setting different standards for professions the legis-

lature was acting in a rational manner. Petitioner challenges his unequal treatment. It is up to respondents to rebut his allegations. The resolution of these differences presents a substantial constitutional question. See, e. g., *Green v. Waterford Bd. of Ed.*, 473 F. 2d 629 (2d Cir. 1973).

In short, the actions of the District Court and the Court of Appeals in dismissing petitioner's complaint are in direct violation of this Court's mandate in *Goosby v. Osser, supra,* and *Idewild Bon Voyage Liquor Corp. v. Epstein, et al.*, 370 U. S. 713 (1962). Therefore, this Court should grant petitioner's petition for certiorari on this ground.

II.

Even if petitioner's claim did not entitle him to the convening of a three-judge court, his complaint stated a cause of action which could not be summarily dismissed without a hearing on the merits.

Petitioner Pordum, in his complaint, claimed federal jurisdiction under 28 U.S.C. 1343 (3), and 42 U.S.C. 1983. The basis of the complaint was the allegation of violation of appellant's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioner further requested that injunctive relief be granted and that a three-judge court be convened.

If a district judge finds the case not one for three-judge review, he may so determine. However, if there is jurisdiction of the plaintiff's claim, he should proceed with the trial of the case in a regular one-judge district court. Cf. *Board of Supervisors of Louisiana State University v.*

Tureaud, 225 F. 2d 434, 435 (5th Cir. 1955). In the instant case, petitioner's motion for injunctive relief was denied. The complaint, however, was dismissed.

The decision of a single judge in refusing to convene a three-judge court is limited to an examination of the pleadings. *Calloway v. Briggs,* 443 F. 2d 296 (6th Cir. 1971). It is submitted that the dismissal in the instant case was in error, for the complaint stated a cause of action and a basis of federal jurisdiction under 28 U.S.C. §1343(3). Petitioner Pordum claimed in paragraph 17 of his complaint that he was deprived of property without due process of law; that *Education Law* §305(7) is vague and indefinite and in violation of the substantive due process requirements of the Fourteenth Amendment to the United States Constitution. Pordum further claimed that he had been denied a further hearing or an opportunity to be heard in violation of the procedural due process guarantees of the Fourteenth Amendment of the United States Constitution (complaint paragraph 18). In addition Pordum claimed that there was a substantial question whether New York *Education Law* §305(7) was not also operating to "chill" the exercise by persons of rights guaranteed them by the First Amendment to the United States Constitution (complaint paragraph 20). The complaint (paragraph 20), further alleged a denial of equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

It is submitted that the District Court and the Court of Appeals have not only determined the validity of the request for a three-judge court, but decided the merits of the complaint. Even on a motion to dismiss, when, as here, no answer has been filed, the complaint must be construed in the light most favorable to the plaintiff.

The District Court, in substance, dismissed Pordum's complaint by granting respondents summary judgment. In *Adickes v. Kress*, 398 U. S. 144, relied on by the District Court, the Supreme Court reversed the district court in regard to the granting of summary judgment denying petitioner's 42 U.S.C. 1983 argument. On page 153 of its decision, the Court noted:

> "In granting respondent's motion [for summary judgment], the district court simply stated that there was no evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded person' might draw an inference of conspiracy' * * * Our own scrutiny of the factual allegations of petitioner's complaint * * * convinces us that summary judgment was improper here, for we think respondent has failed to carry its burden of showing the absence of *any* genuine issue of fact." (Italics supplied.)

In similar fashion, the District Court, in the case at bar, wrongfully dismissed Pordum's complaint by failing "to carry its burden of showing the absence of any genuine issue of fact." The issues presented were clear: due process violations, failure to provide a hearing prior to suspension, lack of statutory specificity and standards, deprivation of liberty and property. The District Court and the Court of Appeals prematurely determined the merits of the complaint since no hearing had been held to develop the factual basis for a decision on the merits.

In *Adickes v. Kress, supra*, the Supreme Court stated on page 150 of its decision:

> "The terms of [42 U.S.C.] §1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must

> show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'"

It is submitted the petitioner has shown that respondents' actions have deprived him of both a right of liberty and property guaranteed by the due process clause of the Fourteenth Amendment of the Constitution. It is also submitted that he has been so denied through the actions of State of New York officials acting pursuant to state law, namely New York *Education Law* §305(7). Thus both requirements for a viable issue of fact have been met pursuant to the rule laid down in *Adickes, supra.*

Jurisdiction has been laid in the Federal District Court under 28 U.S.C. §1343(3). As alleged in the case at bar for jurisdiction pursuant to 42 U.S.C. §1983, similar deprivations of constitutional rights are reasserted as violations redressable under 28 U.S.C. §1343(3).

The above allegations in Pordum's complaint, based on the jurisdictional predicate claimed under 28 U.S.C. §1343(3), provided adequate federal questions for review by the District Court. The aforementioned court, however, by dismissing appellant Pordum's request for injunctive relief and a three-judge court, never considered petitioner Pordum's complaint on its merits and prematurely dismissed it.

Conclusion.

For the foregoing reasons petitioner respectfully urges that this Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Second

Circuit, reverse the judgment of that court and remand for further proceedings in accordance with this court's decisions in *Goosby v. Osser,* 409 U. S. 512 (1973), and *Arnett v. Kennedy,* U. S. , 42 L. W. 4513 (April 16, 1974).

Dated: July 1, 1974.

Respectfully submitted,

BERNARD F. ASHE,
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Of Counsel:

JAMES R. SANDNER,
IVOR R. MOSKOWITZ.



APPENDIX A.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

FREDERICK F. PORDUM,

Appellant,

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK, *et al.*,

Appellees.

No. 279, Docket 73-1842.

Argued Jan. 10, 1974.
Decided Feb. 20, 1974.

Bernard F. Ashe, Albany, N. Y. (James R. Sandner, and Ivor R. Moskowitz, Albany, N. Y., of counsel), for appellant.

Margery Evans Reifler, Deputy Asst. Atty. Gen. (Louis J. Lefkowitz, Atty. Gen. of N. Y., Samuel A. Hirshowitz, First Asst. Atty. Gen., of counsel, for appellees.

Before Kaufman, Chief Judge, and Smith and Feinberg, Circuit Judges.

J. JOSEPH SMITH, Circuit Judge:

This is an appeal from a decision of the United States District Court, Northern District of New York, James T. Foley, Chief Judge, entered on April 26, 1973, reported at 357 F. Supp. 222, refusing to convene a three-judge

court to consider the constitutionality of section 305(7) of the New York Education Law and otherwise dismissing appellant Pordum's complaint. We affirm.

Frederick F. Pordum is a tenured teacher in the Lackawanna, New York school system. He holds a New York State Teaching Certificate issued by the Commissioner of Education of New York State. In 1967, Pordum requested and received a two-year leave of absence from the school district, and this leave was subsequently extended for an additional three years, to expire on January 1, 1973. In June 1971, while Pordum was a member of the Erie County Legislature, he was convicted in the United States District Court, Western District of New York, of the crime of conspiracy to promote and facilitate the promotion of bribery of public officials, a felony under 18 U.S.C. §371. He was sentenced to serve three years in prison.

On December 22, 1972, Pordum was released on parole from prison. He wrote to the Lackawanna school system on December 29, stating that his leave of absence was about to expire and that he was ready to resume teaching. By letter dated January 24, 1973, the school district informed appellant that it had assigned him to Wilson Elementary School, effective February 1, 1973, the beginning of the new term.[1]

Also on January 24, the Commissioner of Education wrote to appellant, ordering him to show cause on February 15, 1973, at a hearing why his teaching certificate should not be revoked. The Commissioner stated in the letter that he was acting pursuant to section 305(7), which provides:

> He [the Commissioner] may annul upon cause shown to his satisfaction any certificate of qualifica-

[1] Neither the letter nor the parties specified what grade or subject Pordum was to teach. But it appears from several suggestions in that letter concerning preparation and from the oral argument before Judge Foley that appellant was to be a classroom teacher and not a special duties teacher.

> tion granted to a teacher by any authority whatever or declare any diploma issued by a state teachers college and state colleges for teachers ineffective and null as a qualification to teach a common school within this state, and he may reconsider and reverse his action in any such matter.

In a separate letter dated January 24, the Commissioner ordered the Lackawanna school district not to re-employ Pordum pending the outcome of the February 15 hearing. On January 30, the school district informed appellant that he would be notified by the district or by the Commissioner if and when he was to report to work.

Appellant has refused to comply with the hearing procedure. At his request, the hearing was postponed until March 30, 1973. On March 8, he commenced this action in the United States District Court, naming the Commissioner and the school district as defendants and challenging the constitutionality of section 305(7). The Commissioner remains prepared to go forward with the hearing. The school district, meanwhile, asserts that it is ready and willing to employ Pordum, without a hearing. Although a defendant in this lawsuit, the district joined in appellant's motion below for immediate reinstatement. The district did not appear at oral argument.

Appellant contends that section 305(7) is unconstitutional in that it does not afford due process of law, is fatally vague, violates the equal protection clause, and is overbroad. Judge Foley concluded that these claims were either foreclosed by previous decisions of the Supreme Court or obviously lacking in merit and that therefore a three-judge court need not be convened. *Goosby v. Osser*, 409 U. S. 512, 518, 93 S. Ct. 854, 35 L. Ed. 2d 36 (1973). We agree with this conclusion.

In the Commissioner's letter of January 24 to appellant, appellant was notified that a hearing would be held prior to the Commissioner's ultimate disposition of the teaching certificate, that a hearing officer would preside, that appellant would be allowed to present evidence, cross examine witnesses and obtain a copy of the transcript of the hearing. At oral argument, the Commissioner stated that judicial review of the Commissioner's determination was available pursuant to Article 78 of the New York Civil Practice Law and Rules. As Judge Foley found, these rights were granted "with an attitude of fairness to insure compliance with due process requirements." 357 F. Supp. at 225. Appellant does not contest these procedures. He challenges only the failure to afford him a hearing prior to his suspension.

The Commissioner characterizes this claim as an argument that Pordum must be *reinstated* as a teacher pending a hearing. Appellant emphasizes the fact that he has been ordered to report as a teacher by the school district and argues that the job cannot be *taken away* from him before a hearing is held. Semantics aside, Pordum's position is this: He must be allowed to teach in Wilson Elementary School until a hearing is held and a decision based on that hearing, concerning his fitness to teach has been made, a matter of three or four weeks. Appellant is not complaining of procrastination by the Commissioner; his position is that the Commissioner cannot keep him out of the classroom for one day pending a hearing.

In evaluating any due process claim, we must begin with the question whether a "liberty" or "property" interest is at stake. The interest of an untenured college teacher in his job was held in *Board of Regents v. Roth*, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), to be insufficient to invoke the protection of the due

process clause. The *Roth* Court emphasized the non-stigmatic nature of a failure to rehire an untenured teacher and the fact that the action did not seriously impede the teacher's ability to secure another teaching position.

Pordum's interest in retaining his certification is materially more substantial than that of the teacher in *Roth*. Pordum is a tenured teacher. Moreover, while it is uncertain whether revocation of his certification will automatically bar him from teaching in the public schools of New York State,[2] such action would amount to an official declaration that he is unfit to teach and might well impede his ability to secure a teaching job, in public or private schools, in New York or in another state. His interest in his certificate is a sufficient property interest to be protected by the due process clause and, indeed, Pordum is being afforded a hearing prior to potential revocation. This does not, however, necessarily require a hearing prior to his temporary suspension.

An analysis of a due process claim to a prior hearing must start from the proposition that "• • • an individual [must] be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U. S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971) (original emphasis). Governmental interests which have been held sufficient to outweigh the individual's interest in a prior hearing include the cost to the public

[2]Appellant contends that the Commissioner does not have the power to suspend or dismiss a teacher, only to revoke certification. This contention is questionable. *See* text at notes 10-11. But since a school district which employs a non-certified teacher may not receive state aid, section 3604, it is unlikely that Pordum would be hired by the public school districts of New York if his certification were revoked.

of using probably useless drugs,[3] the threat to the credit position of a bank,[4] the finding that food was unfit to eat,[5] the national security,[6] the prevention of tax evasion,[7] the possibility of irregular securities dealing,[8] the pendency of charges of misbehavior by police officers,[9] and the threat to the safety of drivers and pedestrians.[10] In each of these cases, the court scrutinized the pertinent competing considerations to determine whether summary administrative action was justified.

Here, the Commissioner asserts the interest of the well-being of the children at Wilson Elementary School. He does so in a conclusory manner, but we presume that this general interest encompasses Pordum's possible corrupting influence, the possibility that the students might not respect Pordum, and the disruption of the educative process which would result if Pordum were removed from the classroom subsequent to the hearing after having

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[3] *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594, 70 S. Ct. 870, 94 L. Ed. 1088 (1950) (seizure of drugs).

[4] *Fahey v. Mallonee*, 332 U. S. 245, 67 S. Ct. 1552, 91 L. Ed. 2030 (1947) (seizure of assets).

[5] *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908) (seizure of food).

[6] *Cafeteria Workers v. McElroy*, 367 U. S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961) (dismissal of employee).

[7] *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1931) ("seizure" of assets).

[8] *R. A. Holman & Co. v. SEC*, 112 U. S. App. D. C. 43, 299 F. 2d 127, cert. denied, 370 U. S. 911, 82 S. Ct. 1257, 8 L. Ed. 2d 404 (1962) (suspension of dealer).

[9] *La Bonte v. City of Berlin*, 85 N. H. 89, 154 A. 89 (1931), and *De Marco v. Board of Chosen Freeholders*, 21 N. J. 136, 121 A. 2d 396 (1956) (suspension of officers).

[10] *Thornhill v. Kirkman*, 62 So. 2d 740 (S. Ct. Fla. 1953) (suspension of driver's license).

taught for several weeks. While the first of these dangers might appear to be improbable, we must remember that teachers serve as models for students and that the minds of elementary school pupils are very impressionable.

Pordum responds by pointing to his bank balance. He argues that he has been unable to provide himself and his family with a "living." But appellant had not been employed as a teacher for five years preceding his suspension and he stands to lose only three or four weeks pay pending the Commissioner's determination (and if he is found fit to teach he may be entitled to back pay under section 3020-a[4]). Moreover, appellant's initial response to notification of the hearing, a request for postponement, and his subsequent actions do not evidence dire need.

In sum, then, the interests of the state are quite significant, while those of appellant are not. In this case, it is the students at Wilson Elementary School who have a right to a prior hearing, not appellant.

In an attempt to escape this result, appellant contended at oral argument that the Commissioner did not have the authority to suspend him and that the school district, in obeying the unauthorized order of the Commissioner not to employ him, breached independent constitutional and statutory duties owing to appellant. This argument is based on the major premise that the Commissioner has the authority only to revoke and annul Pordum's license, not to suspend him from his teaching duties. The Commissioner in response cited section 308 of the Education Law:

> The commissioner of education shall also have power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district

> or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents.

We need not reach this question of New York law in order to dispose of this argument because appellant's minor premises are incorrect. The constitutional duty the district might owe Pordum is identical to the duty analyzed above. As to the statutory duty, it is embodied in section 3020-a(2):

> * * * Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. *The employee may be suspended pending a hearing on the charges and the final determination thereof.* (Emphasis added.)

Even though the school district did not initiate the suspension, it adopted that action.[11] Pordum was not entitled to any more from the school district than he received.

Vagueness

Appellant's vagueness claim must fail because Pordum cannot argue that he was surprised to learn that a felony conviction might bar him from teaching in the public schools of New York State. Section 3020-a of the Education Law, which sets forth the procedure by which a

[11]This acquiescence may have been motivated by a desire to continue receiving state aid. *See* n. 2, *supra*.

tenured teacher may be dismissed by a school district, states that there is a five-year statute of limitations on charges, "except when the charge is of misconduct constituting a crime when committed." This constitutes some notice that criminal behavior is cause for dismissal. The fact that Pordum is being examined pursuant to section 305(7), by the Commissioner, and not under section 3020-a, by the school district, is immaterial to the question of notice. Moreover, common sense is as helpful to this question as is the Education Law: A teacher is fairly chargeable with the knowledge that conduct which will subject him or her to five years in prison, the maximum under 18 U.S.C. §371, will also subject that teacher to review concerning fitness to teach.[12]

As applied to the case of a convicted felon, section 305(7) is not impermissibly vague. Cf., *Beilan v. Board of Public Education*, 357 U. S. 399, 406-408, 78 S. Ct. 1317, 2 L. Ed. 2d 1414 (1957). This conclusion is sufficient to uphold Judge Foley's determination that appellant's claim was without merit. We are not concerned here with other hypothetical situations. "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U. S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524 (1960).

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[12]It is noteworthy that section 6509, which sets forth the definition of "professional misconduct" with respect to disciplinary proceedings for the professions of medicine, physical therapy, massage, dentistry, veterinary medicine, pharmacy, nursing, podiatry, optometry, ophthalmic dispensing, engineering and land surveying, architecture and landscape architecture, public accounting, shorthand reporting, psychology and social work, provides that conviction of a crime under New York or federal law subjects a person to possible dismissal from these professions.

Equal Protection

Appellant next contends that section 305(7) is unconstitutional in that it is silent with respect to procedural standards and vague in defining misconduct whereas section 6509 of the Education Code, which provides for the regulation of other professions, establishes clear and detailed procedures and defines professional misconduct with precision. This is said to result in a denial of equal protection.

This argument relies upon an assumption of an equivalence between the teaching profession and the professions regulated by section 6509, which include massage, landscape architecture, and podiatry. But the teaching profession differs from these other professions in many respects, including the special vulnerability of the client population, the high duty of care owed by the state to that group, and the unique responsibility which the state has to provide an effective system of education.[13] These distinctions justify the legislative determination that different treatment with respect to the disciplining of the different professionals is required. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955).

Overbreadth

Finally, appellant argues that section 305(7) is overbroad and thereby creates an impermissible chilling effect on First Amendment rights. Pordum, however, has not shown and, when asked, could not say in what respect his

[13]The state's duty to educate its citizens is embodied by art. 11, §1 of the New York State Constitution: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

First Amendment rights were being chilled. We express no opinion as to the constitutionality of section 305(7) on this ground as applied to others when we conclude, as we must, that appellant's claim has no merit.

In sum, the lack of substance in Pordum's claims of unconstitutionality was sufficiently obvious that Judge Foley "did not need to call on two other judges for reassurance," *Green v. Board of Elections,* 380 F. 2d 445, 452 (2d Cir. 1967), cert. denied 389 U. S. 1048, 88 S. Ct. 768, 19 L. Ed. 2d 840 (1968); *Nieves v. Oswald,* 477 F. 2d 1109, 1115 (2d Cir. 1973).

Remaining Issues

Appellant contends that even if the court below was correct in refusing to convene a three-judge court, it should not have dismissed his 42 U.S.C. §1983 claim against appellees for the deprivation of his constitutional rights. Since it is clear that appellant's constitutional rights have not been violated, dismissal was proper.[14]

Affirmed.

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[14]There may, of course, be serious problems for the Commissioner's consideration. In brief and at oral argument, the Commissioner stated that the sole function of the hearing was to show that Pordum indeed had been convicted of a crime. The Commissioner argued:

> Assuming the right to a hearing, the purpose of the hearing in this case could only be to explore the facts surrounding the commission of the crime and the subsequent rehabilitation (if any) of the convicted felon. • • • This obviously is restricted here by the fact that appellant has not yet completed his sentence, but rather is on probation, so that the fact of the conviction has not receded and rehabilitation is not a recognizable factor. [Commissioner's Brief, at 22].

(footnote continued)

If the hearing were to proceed in this manner, with the irrebuttable presumption that a person who has been convicted of committing a crime and who is on probation is unfit to teach in the public schools, it might raise serious constitutional difficulties.

Such irrebuttable presumptions are disfavored under the due process clause, *Vlandis v. Kline*, 412 U. S. 441, 446 [93 S. Ct., 2230, 37 L. Ed. 2d 63] (1973), *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186, 4190-91 [U. S. , 94 S. Ct. 791, 39 L. Ed. 2d 52] (Jan. 21, 1974), and will be overturned if they are found to be neither "necessarily nor universally true." *LaFleur*, 42 U.S.L.W. at 4190. The court, however, has upheld the use of a *per se* rule to exclude a class of persons from a certain occupation, but it did so in the context of a rule which was established after a comprehensive investigation into the relationship between the class of persons excluded (those convicted of felonies) and the evil sought to be avoided (corrupt practices by waterfront union officials). *DeVeau v. Braisted*, 363 U. S. 144 [80 S. Ct. 1146, 4 L. Ed. 2d 1109] (1960). Where no such legislative finding is present, exclusion from a profession can be justified only after a detailed and particularistic consideration of the relationship between the person involved and the purpose of exclusion. *Schware v. Board of Bar Examiners*, 353 U. S. 232 [77 S. Ct. 752, 1 L. Ed. 2d 796] (1957).

Moreover, there are factors present here which appear to evidence a need for a close inquiry. Appellant is a tenured teacher, and the school district forcefully asserts its desire to have him teach in Wilson Elementary School. At oral argument before Judge Foley, the school district argued that the children in the class to which appellant was assigned were suffering because they were being taught by a substitute teacher. The Commissioner's view that probationary status is evidence of unfitness to teach is at odds with modern correctional theory. Such thinking bars persons with criminal records from many employment opportunities. *See, generally*, Employment of Former Criminals, 55 Cornell L. Rev. 306, 306-312 (1970), and The Collateral Consequences of Criminal Conviction, 23 Vand. L. Rev. 929, 1001-1018 (1970). These barriers to employment appear to be a major contributor to the high rate of recidivism

(footnote continued)

which plagues society. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections, 32 (1967). The Task Force found that much of this regulation was unreasonable and explained this finding in this way:

> Most of the disabilities and disqualifications in this area [employment] result from the actions of various administrative agencies, rather than directly from the conviction. * * * Such groups tend to be primarily concerned with advancing the interests of their own members. Thus, when faced with the problem of whether to license persons with criminal records, they may be unduly concerned with the effect on the status of their professions. Further, to the extent they try to consider the public interest, they are likely to have an unrealistic view of the importance of their own profession or occupation and the potential harm to the public that might be done by unfit persons.

Id. at 91. While these comments may be more directly relevant to other professions, the message is not entirely inapposite in this case. Finally, it is conceivable that Pordum will be a better teacher for his prison experience. *See, e. g.*, Nordheimer, "Ex Convicts Teach Delinquents Crime Doesn't Pay," *The New York Times,* December 24, 1973, p. 7. "The best teachers, it [a project funded by the Federal Government] is trying to demonstrate, are those who have been through the nation's corrections systems and know what it does to young minds."

However, we do not reach these questions or express any opinion thereon. After a thorough consideration of the matter, the Commissioner may conclude that there is an inevitable relationship between a criminal conviction, or between convictions of a type, and unfitness to teach and therefore deem a particularistic inquiry unnecessary in this case. Such a conclusion would be reviewable and might be found to be warranted. It must, of course, be based on more than administrative convenience. *LaFleur,* 42 U.S.L.W. at 4191 [94 S. Ct. 791].

APPENDIX B.

FREDERICK F. PORDUM,

Plaintiff,

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK *et al.*,

Defendants.

No. 73-CV-98.

United States District Court,
N. D. New York.

April 26, 1973.

Bernard F. Ashe, James R. Sandner, Albany, N. Y., for plaintiff.

Louis J. Lefkowitz, Atty. Gen. of N. Y., Albany, N. Y., for defendants, Bd. of Regents of the State of N. Y. and Ewald B. Nyquist, Commissioner; Lawrence L. Doolittle, Asst. Atty. Gen., of counsel.

Peter A. Vinolus, Lackawanna, N. Y., for defendant, Lackawanna City School Dist.

MEMORANDUM-DECISION and ORDER

JAMES T. FOLEY, Chief Judge.

The plaintiff brings this action pursuant to 42 U.S.C. §1983 and alleges he is being deprived of his First and Fourteenth Amendment rights through the implementation of Section 305(7) of the Education Law by the Commissioner of Education of New York State. Section 305(7) of the Education Law, McKinney's Consol. Laws,

c. 16, gives the Commissioner the power to annul the certificate of qualification of a school teacher upon cause shown to his satisfaction. Jurisdictional bases alleged are 28 U.S.C. §1343(3) and 28 U.S.C. §2281. 28 U.S.C. §1343(3) has been described as the jurisdictional counterpart of the cause of action created by 42 U.S.C. §1983. (*Tichon v. Harder*, 2 Cir., 438 F. 2d 1396, 1398, n. 4).

The essential facts as set forth in the complaint are undisputed. The plaintiff is a teacher, certified by the State, and has been granted tenure by the Board of Education of the City of Lackawanna. In 1967, the plaintiff was granted a two-year leave of absence which was subsequently extended in 1969 for two years and in 1972 for one year. During the interim period, the plaintiff was convicted in the United States District Court, Western District of New York, on June 16, 1971, of the crime of conspiracy involving bribery of public officials in violation of 18 U.S.C. §371, and was sentenced to a period of confinement of three years. At that time the plaintiff was a member of the Erie County Legislature. The plaintiff was released on parole on December 22, 1972. On December 29, 1972, the plaintiff notified the Board of Education of the City of Lackawanna that he was ready to resume his active teaching duties and by letter dated January 24, 1973, the plaintiff was notified of his specific assignment effective February 1, 1973. On January 24, 1973, the Commissioner of Education enjoined the school district from reemploying or reinstating the plaintiff and further ordered the plaintiff to show cause why his teaching certificate should not be cancelled. In this federal litigation, we do have the unusual situation of the Lackawanna School City District in the affidavit of its Attorney Peter A. Vinolus, stating a position somewhat adverse to that of the State defendants and the Attorney General at this stage. The position is that the School District is ready and willing to accept the plain-

tiff as a teacher under its contract and that it joins in the motion of plaintiff to have him return to work pending the outcome of this action. [See Portnoy, Employment of Former Criminals, 55 Cornell L. Rev. 306, 307 (1970)].

As the complaint requests this court to convene a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284, it is necessary to initially determine if the various constitutional claims set out in the complaint are substantial. (*Ex parte Poresky*, 290 U. S. 30, 32, 54 S. Ct. 3, 78 L. Ed. 152). One of two standards must be met before it can be determined there is a lack of substantiality in the federal questions presented: either obvious lack of merit in the allegations or foreclosure of the issues by previous decisions of the United States Supreme Court. (*California Water Service Co. v. City of Redding*, 304 U. S. 252, 255, 58 S. Ct. 865, 82 L. Ed. 1323; *Green v. Board of Elections of City of New York*, 2 Cir., 380 F. 2d 445, 448). There is extensive writing about the convening of three judges, its problems and burdens, but it has been simply and clearly expressed that the statutory enactment in that regard is technical and not to be construed with great liberality. (*Mitchell v. Donovan*, 398 U. S. 427, 431, 90 S. Ct. 1763, 26 L. Ed. 2d 378; *Kramer v. Union Free School District No. 15*, 2 Cir., 379 F. 2d 491, 495; *Jackson v. Choate*, 5 Cir., 404 F. 2d 910, 913).

The plaintiff first contends Section 305(7) of the Education Law of New York is vague and indefinite and therefore violates the due process clause of the Fourteenth Amendment to the United States Constitution. (Para. 17 of the complaint). It is settled that a license, of which is the nature of a teaching certificate, essential to the pursuit of a livelihood may not be taken away without procedural due process as required by the Fourteenth Amendment. (*Bell v. Burson*, 402 U. S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90). The vagueness claim is

based upon the allegation that the statute, by utilizing the standard "upon cause shown to his satisfaction", is indefinite and has no guidelines to correct this inherent deficiency. This claim has been foreclosed in my judgment by the United States Supreme Court which has given specific approval to the standard "'for any unprofessional conduct of the holder of such certificate, or for other sufficient cause.'" (*Lehmann v. Board of Accountancy*, 263 U. S. 394, 398, 44 S. Ct. 128, 68 L. Ed. 354; see also, *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 108, 58 S. Ct. 443, 82 L. Ed. 685). The Court in *Lehmann* also noted that further implementing regulations were unnecessary. The use of the term "incompetency", similar to "cause shown", has been approved when used to discharge a public school teacher with it being noted the term had a common and approved usage. (*Beilan v. Board of Education*, 357 U. S. 399, 406-407, 78 S. Ct. 1317, 2 L. Ed. 2d 1414). The New York Court of Appeals has upheld the use of the standard "for cause" in the face of a charge of vagueness and alluded to the standard of "good behavior" which federal judges are held to by Section 1 of Article III of the United States Constitution. (*Friedman v. State of New York*, 24 N. Y. 2d 528, 541, 301 N. Y. S. 2d 484, 249 N. E. 2d 369; see *Napolitano v. Ward* [N. D. Ill.] 317 F. Supp. 79 [denying a three-judge court with the term "for cause" at issue]; see also, *Sarisohn v. Appellate Div., Second Dept., S. Ct. of St. of New York* [E.D.N.Y.], 265 F. Supp. 455, 458, n. 4). There is, in my judgment, sufficient precedent in the decisions of the United States Supreme Court and the New York Court of Appeals to foreclose the vagueness claim as it relates to the convention of a three-judge court.

The plaintiff next contends that since the section of the statute challenged does not specifically denote due process procedures concerning notice of charges avail-

ability of a hearing, and hearing procedures to be used, the plaintiff is being deprived of the procedural due process required by the Fourteenth Amendment. (Para. 18 of the complaint). This contention is, in my judgment, without merit. In the Commissioner's order to show cause dated January 24, 1973, the plaintiff was notified of the charge against him, namely, that his conviction under 18 U.S.C. §371 raised "substantial doubt with respect to the fitness of such individual to teach in the public schools of the State." (Ex. G attached to the complaint). On February 15, 1973, in response to an inquiry by the plaintiff's attorney on February 6, 1973, and a month in advance of the commencement of this action, the Commissioner's office set out the procedures which would be followed at a hearing of the charge. (Ex. 1 attached to affidavit in opposition of the Attorney General of New York State). The plaintiff was notified of the availability of a hearing, the hearing officer designated, the fact that established administrative procedures would be used, the opportunity to present evidence and cross-examine witnesses, and the right to be supplied a full transcript of the stenographic record of the proceedings apparently without charge. Thus the plaintiff it seems plain has been accorded the full range of due process rights which have been granted, in my judgment, not in an attempt to evade review of the challenged statute, but with an attitude of fairness to insure compliance with due process requirements. Therefore, I find §305(7) has not been applied in an unconstitutional manner in regard to due process notice and hearing rights. Furthermore, in light of the court rulings dealing with tenure of teachers (e. g., *Slochower v. Board of Education*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692), state granted licenses (*Bell v. Burson, supra*), and the present statutory scheme providing for hearing procedures in the dicharge of tenured teachers (Education Law §2573[5]) (McKin-

ney's Supp. 1972); Education Law §3020-a (McKinney's 1970), it would seem incongruous to assume the Commissioner would apply §305(7) in the future without affording a party the various due process protections specifically accorded in this situation. In addition, the state courts have held a tenured teacher who does not possess a certificate cannot be discharged without being offered the proper hearing procedures and that lack of a certificate only bears upon the issue of incompetency as set forth in Education Law §2573(5) *(supra)*. (*Matter of Mannix v. Board of Educ.*, 21 N. Y. 455, 460, 288 N. Y. S. 2d 881, 235 N. E. 2d 892; *Matter of Kobylski v. Agone*, 37 Misc. 2d 255, 263, 234 N. Y. S. 2d 907).

In addition to the Fourteenth Amendment argument of vagueness, the plaintiff next contends §305(7) of the Education Law is overbroad and "could be utilized to chill" First Amendment rights. Again the argument is foreclosed by previous rulings of the United States Supreme Court. It is settled that a court should never "anticipate a question of constitutional law in advance of the necessity of deciding it." (*United States v. Raines*, 362 U. S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524). In *Raines* the Court, as here, found a statute had not been applied in an unconstitutional manner and therefore the plaintiff could not attack the statute on its face. *Raines* and the cases cited therein dealt specifically with the issue of an overbroad statute in the First Amendment context. Of course in the present situation the plaintiff has been informed of the exact nature of the charges against him and there is no alleged actual violation of First Amendment rights.

The last allegation, also contained in paragraph 20 of the complaint and apparently levied as a parting shot at the challenged section, is in my view obviously without merit. The bare allegation is made that there is a violation of the Equal Protection Clause in that other pro-

fessions are treated differently and is totally conclusory in nature and unsupported by any factual allegations. There is a legitimate state end in the purposes of the statute and no invidious discrimination shown. (*Williamson v. Lee Optical Co.*, 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563; *McDonald v. Board of Election Commissioners*, 394 U. S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739). The standard of conduct for a teacher is not unlike the standards familiarily required in the other professions and the judiciary within the State of New York, and such an unsupported allegation by bare statement will not create a substantial federal question such as to necessitate the convening of a three-judge court. (*Sarisohn v. Appellate Div., Second Dept., supra*).

In my judgment, the allegations in the complaint on their face do not raise questions of sufficient federal constitutional substance to warrant the convention of the statutory three-judge court pursuant to the jurisdictional authorization of 28 U.S.C. §2281. Under this ruling there is no need to consider the vitality of the exhaustion doctrine or need for exhaustion of administrative remedies under *Eisen v. Eastman*, 2 Cir., 421 F. 2d 560, cert. den. 400 U. S. 841, 91 S. Ct. 82, 27 L. Ed. 2d 75. (See *King v. Smith*, 392 U. S. 309, 312, n. 4, 88 S. Ct. 2128, 20 L. Ed. 2d 1118; *James v. Board of Education of Central Dist. No. 1, etc.*, 2 Cir., 461 F. 2d 566-570). There remains the jurisdictional allegation of 28 U.S.C. §1343 (3) under which there is the requirement to state a substantial constitutional claim. (*Almenares v. Wyman*, 2 Cir., 453 F. 2d 1075, 1082, cert. den. 405 U. S. 944, 92 S. Ct. 962, 30 L. Ed. 2d 815). The findings outlined herein that the allegations in the complaint are insubstantial for purposes of 28 U.S.C. §2281 likewise require the dismissal of the complaint as it alleges jurisdiction under 28 U.S.C. §1343(3), and the reliance on 42 U.S.C.

§1983. (See *Powell v. Workmen's Compensation Bd. of State of New York,* 2 Cir., 327 F. 2d 131, 137; *Snowden v. Hughes,* 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497; *Adickes v. Kress,* 398 U. S. 144, 150, 90 S. Ct. 1598, 26 L. Ed. 2d 142).

The motions of plaintiff requesting the convening of a three-judge court and to grant a temporary restraining order and preliminary injunction are denied and the complaint is dismissed for lack of jurisdiction. (*Utica Mutual Ins. Co. v. Vincent,* 2 Cir., 375 F. 2d 129, 130-131).

It is so ordered.

APPENDIX C.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 4th day of April, one thousand nine hundred and seventy-four.

FREDERICK F. PORDUM,

Plaintiff-Appellant,

against

BOARD OF REGENTS OF THE STATE OF NEW YORK and EWALD B. NYQUIST, THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, and THE CITY SCHOOL DISTRICT OF THE CITY OF LACKAWANNA,

Defendants-Appellees.

Docket No. 73-1842

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

APPENDIX D.

Federal Statutes.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

5 §7501. Cause; procedure; exception

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

* * *

18 §371 Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

• • •

28 §1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

• • •

28 §2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State

statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation, or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted dili-

gently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

* * *

42 §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

New York State Statutes.

§305. *General powers and duties.*

* * *

7. He may annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher by any authority whatever or declare any diploma issued by a state teachers college and state colleges for teachers ineffective and null as a qualification to teach a common school within this state, and he may reconsider and reverse his action in any such matter.

* * *

§2509. *Appointment of assistant and other superintendents, teachers and other employees*

* * *

2. At the expiration of the probationary term of any persons appointed for such term, or within six months

prior thereto, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. By a majority vote the board of education may then appoint on tenure any or all of the persons recommended by the superintendent of schools. Such persons and all others employed in the teaching service of the schools of such school district who have served the full probationary period shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a of such law. Failure to maintain certification as required by this chapter and the regulations of the commissioner of education shall constitute cause for removal.

* * *

§2573. *Appointment of assistant, district or other superintendents, teachers and other employees; their salaries, et cetera*

* * *

5. At the expiration of the probationary term of any persons appointed for such term, the superintendent of schools shall make a written report to the board of education recommending for permanent appointment those persons who have been found competent, efficient and satisfactory. Such persons and all others employed in the teaching service of the schools of a city, who have served the full probationary period, or have tendered satisfactorily an equivalent period of service prior to June eighth, nineteen hundred seventeen, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a of such law. In a city in which teachers

did not have permanent tenure under the laws in force prior to June eighth, nineteen hundred seventeen, such teachers shall be entitled to receive permanent appointments after serving the probationary period fixed by the board of education as herein provided.

* * *

§3012. *Tenure: certain union free school districts.*

1. (a) Teachers and all other members of the teaching staff shall be appointed by the board of education of a union free school district having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, upon the recommendation of such superintendent of schools, for a probationary period of five years. The service of a person appointed to any of such positions may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education.

* * *

2. At the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. Such persons, and all other employed in the teaching service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character or conduct unbecoming

a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; (c) failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. Each person who is not to be recommended for appointment on tenure, shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period.

3. Notwithstanding any other provision of this section no period in any school year for which there is no required service and/or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights of any of the persons hereinabove described.

§3013. *Tenure: certain other school districts.*

1. (a) Teachers and all other members of the teaching staff, of school districts employing eight or more teachers, other than city school districts and school districts having a population of four thousand five hundred or more and employing a superintendent of schools, shall be appointed by a majority vote of the board of education or trustees upon recommendation of the district superintendent of schools from lists submitted to such district superintendent by the principal of the district in which they are to be employed for a probationary period of five years. Services of a person so appointed to any such positions may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees.

• • •

2. On or before the expiration of the probationary term of a person appointed for such term, the district superin-

tendent of schools shall make a written report to the board of education or trustee recommending for appointment on tenure, from lists and reports furnished by the principal of the district, those persons who have been found competent, efficient and satisfactory. By a majority vote the board of education or trustees may then appoint on tenure any or all of the persons recommended by the district superintendent of schools. Such persons shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) Insubordination, immoral character or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty; (c) Failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. Each person who is not to be so recommended for appointment on tenure shall be so notified in writing by the district superintendent not later than sixty days immediately preceding the expiration of his probationary period.

3. Notwithstanding any other provisions of this section no period in any school year for which there is no required service and/or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights of any of the persons hereinabove described.

§3014. *Tenure: boards of cooperative educational services*

1. Administrative assistants, supervisors, teachers and all other members of the teaching and supervising staff of the board of cooperative educational services shall be appointed by a majority vote of the board of cooperative educational services upon the recommendation of the dis-

trict superintendent of schools for a probationary period of not to exceed five years. Services of a person so appointed to any such positions may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of cooperative educational services.

2. On or before the expiration of the probationary term of a person appointed for such term the district superintendent of schools shall make a written report to the board of cooperative educational services recommending for appointment on tenure persons who have been found competent, efficient and satisfactory. Such persons shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) Insubordination, immoral character or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty; (c) Failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. Each person who is not to be so recommended for appointment on tenure shall be so notified in writing by the district superintendent not later than sixty days immediately preceding the expiration of his probationary period.

§3020-a. *Hearing procedures and penalties.*

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district

or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within ten days of receipt of the statment of charges, the employee shall notify the clerk of the employing board whether he desired a hearing on the charges. The inexcused failure of the employee to notify the clerk of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. *Notice of hearing.* Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose: one member shall be selected by the employee, one member shall be selected by the employ-

ing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceed-

ing under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

§6509. *Definitions of professional misconduct.*

Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

(1) Obtaining the license fraudulently,

(2) Practicing the profession, fraudulently, beyond its authorized scope, with gross incompetence, or with gross negligence,

(3) Practicing the profession while the ability to practice is impaired by alcohol, drugs, physical disability, or mental disability,

(4) Being habitually drunk or being or having been addicted to, dependent on, or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects,

(5) Being convicted of committing an act constituting a crime under;

(a) New York State law or,

(b) Federal law or,

(c) The law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York State law.

(6) Refusing to provide professional service to a person because of such person's race, creed, color, or national origin,

(7) Permitting, aiding or abetting an unlicensed person to perform activities requiring a license,

(8) Practicing the profession while the license is suspended, or, after the licensee has wilfully failed to register or notify the department of any change of name or mailing address, or, a professional service corporation wilfully failing to comply with sections fifteen hundred three and fifteen hundred fourteen of the business corporation law, or

(9) Committing unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents.

§6510. *Proceedings in cases of professional misconduct.*

In cases of professional misconduct the proceedings shall consist of (1) prehearing procedures by the education department, (2) hearing procedures by the committee on professional conduct for the particular profession, (3) decision procedures by the board of regents, and (4) review procedures by the appellate division of the third judicial department, as follows:

1. Prehearing procedures.

a. Complaint. A complaint of a licensee's professional misconduct may be made by any person to the education department.

b. Investigation. The department shall investigate each complaint and if the department and the committee on professional conduct for the particular profession decide that a hearing is warranted, the department shall request the attorney general to prepare the charges.

c. Charges. Upon such request the attorney general shall prepare the charges if he decides that a hearing is warranted. The charges shall state the alleged professional

misconduct and shall state concisely the material facts but not the evidence by which the charges are to be proved.

d. Notice of hearing. The department shall set the time and place of the hearing and shall prepare the notice of hearing. The notice of hearing shall state (1) the time and place of the hearing, (2) that the licensee may file a written answer to the charges prior to the hearing, (3) that the licensee shall appear personally at the hearing and may be represented by counsel, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the department.

e. Service of charges and of notice of hearing. A copy of the charges and the notice of hearing shall be served on the licensee personally by the department at least fifteen days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by registered mail to the licensee's last known address by the department at least twenty days before the hearing.

2. Hearing procedures.

a. Hearing panel. The hearing shall be conducted by a panel of five or more members of the committee on professional conduct for the particular profession. The panel shall be appointed by the committee chairman who shall designate the panel chairman.

b. Conduct of hearing. The evidence in support of the charges shall be presented by the attorney general or his

designee. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph d or subdivision one of this section). The panel shall not be bound by the rules of evidence, but its determination of guilt shall be based on substantial legal evidence.

c. Results of hearing. As a result of the hearing the panel (1) shall make findings of fact, (2) shall make a determination of guilty or not guilty on each charge, and (3) in the event of a determination of guilty, shall make a recommendation of the penalty to be imposed. For the panel to make a determination of guilty, a minimum of four-fifths of the panel must vote for such a determination.

d. Disposition of results. The panel shall transmit to the board of regents the transcript of the hearing and the results of the hearing and shall transmit to the licensee the results of the hearing unless the board shall have established a bylaw providing for a review of the record of findings and determination of the panel by the committee on professional misconduct. If such review is required, the committee shall review the record and transcript of the hearing and make a finding and recommendation by a four-fifths vote. The transcript and results of the hearing and the findings and recommendation of the committee shall then be transmitted to the board of regents. The licensee shall be advised of the results.

3. Regents decision procedures.

a. Regents review committee. The transcript and results of the hearing and the recommendation, if any, of the committee shall be reviewed at a meeting by a committee appointed by the board of regents. The committee shall consist of three members, at least one of whom shall be a regent.

b. Review committee meetings. The review shall be based on the transcript, results of the hearing and the recommendation, if any, of the committee, but the licensee may appear at the meeting, and the review committee may require him to appear. The licensee may be represented by counsel. The review committee shall notify the licensee at least seven days before the meeting (1) of the time and place of the meeting, (2) of his right to appear, (3) of his right to be represented by counsel, (4) whether or not he is required to appear, and (5) of such other information that may be considered appropriate. After the meeting the committee shall transmit a written report of its review to the board of regents.

c. Regents decision and order. The board of regents (1) shall consider the transcript, results of the hearing and the recommendation, if any, of the committee and the report of its review committee, (2) shall decide whether the licensee is guilty or not guilty on each charge, (3) shall decide what penalties, if any, to impose as prescribed in section sixty-five hundred eleven of this article, and (4) shall issue an order to carry out its decision. Such decisions shall require the affirmative vote of a majority of the members of the board. If the board disagrees with the hearing panel's determination of not guilty, it shall remand the matter to the panel for a new hearing after which the panel's determination of not guilty shall be final.

4. Court review procedures. The decisions of the board of regents may be reviewed pursuant to the proceedings under article seventy-eight of the civil practice law and rules. Such proceedings shall be returnable before the appellate division of the third judicial department, and such decisions shall not be stayed or enjoined except upon application to such appellate division after notice to the attorney general.

§6511. *Penalties for professional misconduct.*

The penalties which may be imposed by the board of regents on a present or former licensee found guilty of professional misconduct (under the definitions and proceedings prescribed in sections sixty-five hundred nine and sixty-five hundred ten of this article) are: (1) censure and reprimand, (2) suspension of license, (3) revocation of license, (4) annulment of license or registration, and (5) limitation on registration or issuance of any further license. The board of regents may stay such penalties and place the licensee on probation and may restore a license which has been revoked.

APPENDIX E.

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

Before the Commissioner

Decision #8822

IN THE MATTER

of

The Appeal of COLEN GARDNER from action of the Board of Cooperative Educational Services of the Sole Supervisory District of Jefferson and Lewis Counties, with regard to the termination of the services of a probationary teacher.

Bernard F. Ashe, Esq., attorney for petitioner, James R. Sandner, Esq., of counsel.

Willmott, Aylward, Wisner, McAloon & Scanlon, Esqs., attorneys for respondent, Daniel Scanlon, Jr., Esq., of counsel.

Petitioner commenced service as a probationary building maintenance teacher effective September, 1971, and continued to teach in such capacity throughout the 1971-72 and 1972-73 school years. Approximately two weeks prior to the commencement of the 1973-74 school year petitioner was informed by the district superintendent that a problem might exist regarding petitioner's certification status for the 1973-74 school year and that petitioner would be contacted again concerning this matter. In a subsequent conversation prior to the commencement of the school year, petitioner was advised by the dis-

trict superintendent that he should not report for work until his certification status was resolved.

In a letter from the district superintendent dated September 14, 1973, petitioner was informed that he was ineligible for employment for the 1973-74 school year since he had not completed the required number of credit hours needed to maintain his provisional certification. A request for waiver of these requirements was denied by the State Education Department in a letter dated October 10, 1973. Petitioner was then advised by letter dated October 18 from the district superintendent that at respondent board's meeting on November 20, 1973, the district superintendent would recommend that petitioner's probationary appointment be terminated. Petitioner requested a statement of reasons pursuant to section 3031 of the Education Law and the reasons were enumerated in a letter from the district superintendent dated November 2, 1973. At its meeting of November 20, 1973 respondent board voted to terminate the services of petitioner effective 30 days from that date. Petitioner received notice of this decision in a letter from the district superintendent dated November 26 which stated that petitioner's services with the district had been terminated by respondent's resolution of November 20, 1973. Petitioner then commenced this appeal pursuant to section 310 of the Education Law, alleging that his services were wrongfully terminated and requesting that respondent board be ordered to reinstate him to his former position. The record in this appeal indicates that respondent failed to compensate petitioner or view him as an employee throughout the 1973-74 school year.

Where a board seeks to sever the employment relationship between an instructional employee and the district, it must do so strictly in accordance with the provisions of the appropriate tenure statute, which in

the instant case is Education Law, section 3014. That section, insofar as pertinent provides:

> "1. Administrative assistants, supervisors, teachers and all other members of the teaching and supervising staff of the board of cooperative educational services shall be appointed by a majority vote of the board of cooperative educational services upon the recommendation of the district superintendent for a probationary period of not to exceed five years. Services of a person so appointed to any such positions may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of cooperative educational services."

Notwithstanding the lapse of petitioner's certification, the BOCES could not ignore the provisions of section 3014 for discontinuance of the services of a probationer and informally terminate the employment relationship merely by directing the individual not to appear for work at the beginning of the next school year. Respondent did not adopt a resolution terminating the services of petitioner until November 20, 1973. As a result, petitioner was illegally suspended without pay by respondent for the period from the commencement of school in September, 1973 until the completion of proper action by respondent and notice thereof to petitioner.

Respondent's action on November 20, 1973, while effective to the extent that it terminated petitioner's probationary appointment, did not comply with the notice provisions of Education Law section 3019-a. As the Commissioner noted in *Matter of Tedesco*, 4 Ed. Dept. Rep. 3:

> "Under the provisions of section 3012 of the Education Law, a teacher on probation may be

dismissed at any time during his probationary period, by vote of the Board of Education, upon the recommendation of the superintendent, but he is entitled to 30 days' notice, under section 3019-a of the Education Law.

In its attempts to dismiss appellant the Board did not strictly comply with the procedure required by the Education Law, which requires first, a recommendation of dismissal by the superintendent to the Board; second, adoption of a resolution of the Board dismissing the teacher; and third, 30 days' notice of such dismissal. Since the dismissal must be by the Board, the 30 days' notice required by section 3019-a cannot be given until after the Board has acted. The effect of these provisions is that the Board action cannot be effective until 30 days after notice thereof is given to the teacher."

Applying these principles to the facts presented in the instant matter, it is clear that respondent did not comply with the notice requirements set forth in section 3019-a of the Education Law. Since petitioner did not receive formal notice of respondent board's resolution until his receipt of the letter from the superintendent dated November 26, 1973, the termination of petitioner's services could not have been effective until December 26, 1973. Consequently, petitioner is entitled to compensation for the period of time commencing with the start of the 1973-74 school year and ending on December 26, 1973, less the amount of any outside earnings he received during that period (*Matter of Gumpert*, 9 Ed. Dept. Rep. 126; application to reopen granted, 10 *id.* 77; *Matter of Strosberg*, 6 Ed. Dept. Rep. 163; *Matter of Cardo*, 8 *id.* 182).

Respondent alleges that it was not required to compensate petitioner for any period during the 1973-74

school year because such payment would subject respondent to punishment pursuant to sections 3009 and 3010 of the Education Law in view of petitioner's lack of proper certification. However, as the Appellate Division, Third Judicial Department noted in *Matter of Lynch v. Nyquist*, 41 A. D. 2d 363, aff'd N. Y. 2d , certification requirements cannot be used to erode the protections provided by the tenure laws, since such statutes provide the exclusive methods for dismissal of teachers. Respondent was required by law to follow the procedures specified by sections 3014, 3019-a and 3031 of the Education Law (see *Matter of Lynch v. Nyquist, supra; Matter of Mannix v. Board of Education*, 21 N. Y. 2d 455; *Matter of Glass v. Board of Education*, 21 A. D. 2d 891, aff'd 16 N. Y. 2d 982; *Matter of Feingold*, 31 A. D. 2d 969; *Matter of Kobylski v. Agone*, 37 Misc. 2d 255, aff'd 19 A. D. 2d 761).

Petitioner has alleged that respondent should be estopped from terminating the services of petitioner on the basis of lack of certification since it is alleged that petitioner's difficulties regarding this matter were due largely to misrepresentations and unlawful activities by respondent's employees. Respondent, on the other hand, alleges that it in no way condoned or encouraged any unlawful activity by any of its employees and that petitioner was advised of his obligation to obtain certification well before the controversy concerning the termination of his services arose.

While tenure represents the relationship between a teacher and his employer, certification represents the relationship between the teacher and the Commissioner of Education, the state officer responsible for certification of teachers outside of the New York City and Buffalo city school districts. No school district can by its acts of omission or commission bind the Commissioner to waive certification requirements.

Petitioner has not presented sufficient proof that alleged misrepresentations and acts of harassment by respondent's employees caused petitioner to fail to meet the requirements for certification. Petitioner, at the very least, should be charged with knowledge of the professional prerequisites of his position pursuant to the Education Law and the Regulations of the Commissioner, and is responsible for taking those actions necessary to obtain and maintain certification in his field of instruction.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that respondent Board of Cooperative Educational Services shall forthwith pay to petitioner the salary he would have earned from the commencement of the 1973-74 school year until December 26, 1973, less any earnings he may have had during that period from other employment.

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 24th day of May, 1974.

EWALD B. NYQUIST
Commissioner of Education

(Seal.)

APPENDIX F.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

DONALD M. KINSELLA,

Plaintiff,

vs.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

Civil 1973-187

Before Oakes, Circuit Judge, Henderson, Chief District Judge, and Curtin, District Judge.

Appearances:

Bernard F. Ashe, Esq. and James R. Sandner, Esq., Albany, New York, for Plaintiff.

Ohlin, Damon, Morey, Sawyer & Moot (James S. McAskill, Esq., of Counsel), Buffalo, New York; Thomas L. David, Esq., Buffalo, New York, for Defendant Central School District No. 7.

Louis J. Lefkowitz, Esq., Attorney General of the State of New York (Douglas S. Cream, Esq., Assistant Attorney General, of Counsel), for Defendant Nyquist.

HENDERSON, Chief District Judge:

The plaintiff in this action is a tenured school teacher who has been employed by the defendant school board as a physical education and health education instructor for the past fourteen years. On March 1, 1973 the principal of the Senior High School of Sweet Home Central School District, where plaintiff is employed, filed charges against plaintiff with the defendant school board pursuant to provisions of section 3020-a-1 of the Education Law of the State of New York. Those charges allege that on three separate occasions the plaintiff administered excessive corporal punishment to high school students. On March 5, 1973 the school board, acting pursuant to the same statute, made a finding that probable cause existed to support the charges. Plaintiff was notified in writing of the charges and of his right to a hearing before a three-member panel. Plaintiff requested that such a hearing be held, but prior thereto he filed this action, praying for a judgment declaring sections 3012 and 3020-a of the Education Law unconstitutional. Since plaintiff further seeks a permanent injunction against the operation of the above statutes, a three-judge panel was convened to hear argument.

Plaintiff's challenge to the constitutionality of section 3012 is based upon a claim of vagueness and overbreadth. With respect to section 3020-a plaintiff contends that the procedures set forth therein for the removal of a tenured teacher constitute a deprivation of property without due process, a violation of the equal protection clause, and potential infringement of a teacher's First Amendment rights. The court finds the equal protection and First Amendment claims to be improperly raised in this litigation.[1] The plaintiff's remaining contentions will be discussed in turn, together with the question of this court's abstention, which was raised initially at oral argument.

ABSTENTION

In a proper case for abstention, the uncertainty in state law must be such that construction of the statute by a state court might obviate the need for decision of a federal constitutional question. *Railroad Commission v. Pullman Co.*, 312 U. S. 496 (1941); *Zwickler v. Koota*, 389 U. S. 241, 248-49 (1967).

The Supreme Court has repeatedly emphasized that abstention should not be ordered merely to give the state courts the first opportunity to decide constitutional issues. It has also cautioned that abstention frequently leads to piecemeal adjudication in many courts, which will cause an undue delay of the ultimate decision on the merits. *Baggett v. Bullitt*, 377 U. S. 360, 378-79 (1964).

With these guidelines in mind, we conclude that the instant case is not an appropriate one for abstention. The facts of this case do not raise questions of ambiguity in the state statute which the state courts might resolve in a way that would end the constitutional controversy. *Wisconsin v. Constantineau*, 400 U. S. 433 at 439 (1971). Nor is this a case where principles of comity would require abstention in the face of a pending state court proceeding. *Lake Carriers Association v. MacMullan*, 406 U. S. 498 at 509 (1972).

VAGUENESS AND OVERBREADTH

Section 3012 of the Education Law provides:

> "2. . . . Such persons, [teachers appointed to tenure] and all others employed in the teaching service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be

removed except for any of the following causes, after a hearing, *as provided by section three thousand twenty-a of such law*: (a) *insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty;* (c) failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. . . ." (Italics added.)

Plaintiff contends that the underscored language is both unconstitutionally vague and overbroad in that it fails to set forth guidelines for its application, either in other statutes or in the rules or regulations of either defendant, citing *Connally v. General Construction Co.*, 269 U. S. 385 (1926). We find this contention without merit. Whatever may be the outer limits of the statutory language in question, that uncertainty has little relevance where the conduct alleged falls squarely within the hard core of conduct the statute was designed to proscribe. *Broadrick v. State of Oklahoma*, 41 U. S. L. W. 5111 (U. S. June 25, 1973). The charges filed against the plaintiff in this case constitute conduct which, if proven, would fall squarely within the statutory language set forth above.

Due Process

Section 3020-a of the Education Law provides the administrative machinery for processing charges against a tenured teacher.[2] Such charges must be filed in writing with the clerk of the employing school district. Within five days of the date the school board is notified of the charges, the board, meeting in executive session, determines by majority vote whether probable cause exists to support the charges. If a probable cause finding is made, a written statement of the charges is

sent to the teacher. The teacher may then elect to have a hearing before a three-member panel selected from a list maintained by the Commissioner of Education, and presided over by a hearing officer selected by the commissioner. At such a hearing the rules of evidence do not apply, but the teacher may be represented by counsel, may testify in his own behalf, and may subpoena and cross examine witnesses. A verbatim record of the hearing is kept, transcribed and furnished to the teacher without charge. Following the hearing, the panel forwards its report and the transcripts of the proceedings to the commissioner. The Commissioner of Education then forwards to the employing board a hearing report setting forth the findings and recommendations of the hearing panel, including any recommendation as to penalty. The statute states that within thirty days of receipt of the hearing report, the employing board "shall determine the case by a vote of a majority of all members of such board and fix a penalty or punishment, if any . . ."

The plaintiff contends that the procedures set forth in section 3020-a constitute a denial of due process in that (1) a teacher is denied a meaningful hearing of his case because he is not permitted to present favorable evidence or to rebut adverse evidence before the body that has the power to decide the case, that is, the school board; (2) the same attorney who represents the school board at the time of the probable cause finding will act as "prosecuting attorney" before the hearing panel in his capacity as attorney for the school principal who brought the charges, and will continue to act as attorney for the school board and presumably render advice to that board, at the time the case is finally determined; (3) the same body that makes the finding that probable cause exists to support the charge filed against a teacher will ultimately make the final decision

of guilt or non-guilt and will decide upon a penalty; (4) a teacher may be suspended from his duties prior to any hearing.[3]

Any consideration of the procedures required by the due process clause, under a given set of circumstances, must begin with the question of whether the plaintiff may be deprived of "liberty" or "property" within the meaning of the due process clause as a result of those procedures. *Cafeteria and Restaurant Workers v. McElroy*, 367 U. S. 886, 895 (1961).

In two recent decisions, *Board of Regents v. Roth*, 408 U. S. 564 (1972) and *Perry v. Sindermann*, 408 U. S. 593 (1972), the Supreme Court provided guidance as to which interests of government employees are constitutionally protected. Taken together, those cases establish that a tenured teacher has a property interest in continued employment in the absence of "sufficient cause" for dismissal. *Perry v. Sindermann, supra*, at 601-03.

Since we are faced with a possible deprivation of a protected property interest, the ultimate question to be decided is whether the procedures mandated by section 3020-a comply with the requirements of due process.[4]

The crux of the plaintiff's due process claim is a challenge to the procedures involved in the final determination of the employing board which follows the hearing panel stage of the proceedings. The plaintiff contends that while section 3020-a provides for a hearing that conforms to due process standards, the right to a hearing is illusory because nothing that occurs before the hearing panel need have any impact on the school board's final determination.

Section 3020-a has been construed to mean that the findings and recommendations of the hearing panel are merely advisory and not in any way conclusive upon the employing board. *LeTarte v. Board of Education*, 65 Misc. 2d 147, 316 N. Y. S. 2d 781 (1970). The statute

does not require that the school Board's decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceedings even be sent to the school board, although it has been represented at oral argument that the school board may, if it so desires, order the transcript. While the school board does receive a hearing report which contains the findings and recommendations of the panel, that report does not contain even a summary of the evidence elicited at the hearing.

Not only does the procedure outlined above fail to insure that the school board's decision will be based on evidence elicited at the hearing, it provides no safeguard against the school board's basing that decision on *ex parte* evidence. Furthermore, the problem is exacerbated by the fact that the school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision. The situation is analogous to that faced by the Supreme Court in *Goldberg v. Kelly*, 397 U. S. 254 (1970), involving the termination of welfare benefits. The standards set forth in that decision are applicable here:

> "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and on evidence adduced at the hearing. (Citations omitted.) To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on. . . ." (Citations omitted.) *Id.* at 271.

In support of the constitutionality of the statute, the defendants contend that section 3020-a-5 affords the teacher the opportunity to appeal to New York Supreme Court in a special proceeding brought under Article 78 of the New York Civil Practice Law and Rules. The

defendants contend that this provision would require the state court to review the school board's decision in light of the facts elicited at the hearing before the hearing panel.

This court finds that an appeal under Article 78 of the New York CPLR cannot correct the constitutional defects of section 3020-a. Since the school board is not required to set forth reasons in support of its decision, a review of the factual determination relied upon by the board becomes illusory. Simply stated, there will not be an adequate record for a state court to review. See, *United States v. Merz*, 376 U. S. 192 (1964).

The remaining contentions of the plaintiff need not detain us. The plaintiff sees a due process violation in the multiple roles played by both the school board itself and the board's attorney who also represents the school principal before the hearing panel. The affidavit of the school board attorney makes it clear that he never intended to counsel the school board as to its determination in the event this case proceeded to that point. Moreover, the Supreme Court has indicated the performing of multiple functions by individuals or groups in administrative processes is not per se a due process violation. *Richardson v. Perales*, 402 U. S. 389, 410 (1971). See also, *Marcello v. Bonds*, 349 U. S. 302 (1965).

For the foregoing reasons we declare that §302-a [*sic*] of the Education Law of the State of New York, absent administrative regulations requiring decision to be based upon evidence elicited before the hearing panel and the decision of the Board to set forth the reasons and factual basis therefor, is unconstitutional, and the defendants are enjoined from its enforcement until such time as appropriate administrative or legislative action

is taken to remedy the defects in the procedures here involved.

It is so ordered.

/s/ JAMES L. OAKES
U. S. C. J.

/s/ JOHN O. HENDERSON
U. S. D. J.

/s/ JOHN T. CURTIN
U. S. D. J.

Dated: February 19, 1974

[1]Plaintiff's status as a tenured teacher does not give him standing to raise the argument that, since the procedures of section 3020-a are available only to tenured teachers, the statute discriminates against non-tenured teachers. His claim that section 3020-a could be used to chill the First Amendment rights of teachers is without merit, since the undisputed facts of this case raise no question of an infringement of First Amendment rights.

[2]§3020-a. *Hearing procedures and penalties.*

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desired a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than

the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing

board, selected in the following manner from the list maintained by the commissioner of education for such purposes: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

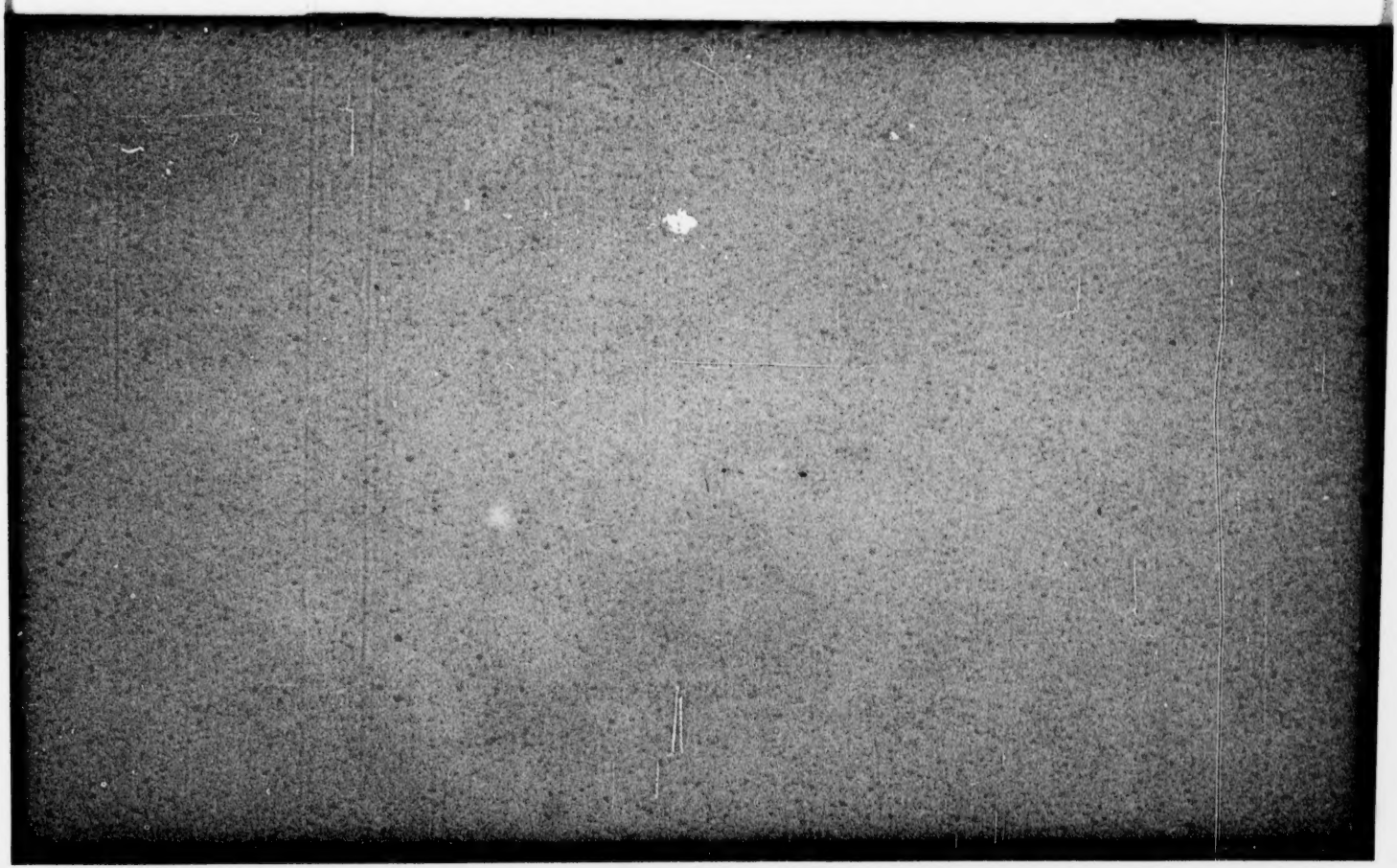
4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article

seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

[3]While we need not reach the question of suspension here since the plaintiff has not in fact been suspended, we note the rather surprising recent decision in *Jerry v. Board of Education*, 347 N. Y. S. 2d 917 (Sup. Ct. 1973), permitting suspension of a tenured teacher without pay on the basis of charges that, if proved, would warrant dismissal.

[4]We note that the Supreme Court has recently, 42 U.S.L.W. 3281 (U. S. Nov. 18, 1973), heard argument in *Kennedy v. Sanchez*, 349 F. Supp. 863 (N.D. Ill. 1972), *prob. juris. noted sub nom. Phillips v. Kennedy*, 411 U. S. 915 (1973), a case in which a three-judge court held certain portions of the Lloyd-Lafollette Act, 5 U. S. C. §7501, relating to discharge procedures applicable to federal competitive service employees, to be unconstitutional. Since the provisions of §3020-a resemble, in some respects, those of 5 U. S. C. §7501, our decision here will have to be applied with deference to the Court's decision when handed down.



Supreme Court, U.S.
FILED
AUG 21 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73—1963

FREDERICK F. PORDUM,

Petitioner,

against

BOARD OF REGENTS OF THE STATE OF NEW YORK and EWALD B. NYQUIST, THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, and THE CITY SCHOOL DISTRICT OF THE CITY OF LACKAWANNA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX IN OPPOSITION FOR RESPONDENTS BOARD OF REGENTS & COMMISSIONER OF EDUCATION

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BOARD OF REGENTS & COMMISSIONER OF EDUCATION

Respondents Board of Regents of the State of New York and Ewald B. Nyquist, Commissioner of Education of the State of New York [hereinafter state respondents] oppose the petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit, dated February 20, 1974. That decision affirmed the opinion and order of the United States District Court for the Northern District of New York, dated April 26, 1973, which denied petitioner's application to convene a three-judge court and dismissed the complaint for want of a substantial federal question.

Opinions Below

The opinion of the Court of Appeals is reported at 491 F. 2d 1281 and reproduced in Appendix A to the petition at pp. 39-51. The opinion of the District Court is reported at 344 F. Supp. 964 and is reproduced in Appendix B to the petition at pp. 52-59.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 20, 1974. In an order dated April 4, 1974 that Court denied the petition for a rehearing en banc. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented

1. Has petitioner presented any factor which would motivate the exercise of this Court's certiorari jurisdiction?

State Statute Involved

New York Education Law:

"§ 305. General powers and duties.

The commissioner of education is hereby charged with the following powers and duties:

• • •

7. He may annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher by any authority whatever or declare any diploma issued by a state teachers college and state colleges for teachers ineffective and null as a qualification to teach a common school within this state, and he may

reconsider and reverse his action in any such matter.
§ 308. Other powers.

• • •

The commissioner of education shall also have power and it shall be his duty to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents."

Statement of the Case

This action was commenced in March of 1973 pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. Petitioner challenged the validity of Section 305(7) of the New York Education Law, which gives the Commissioner of Education the power to annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher. Since petitioner sought to enjoin the operation of this statute, he sought the convening of a three-judge court.

Petitioner is a tenured teacher in the Lackawanna, New York school district. He holds a New York State teaching certificate issued to him by the Commissioner of Education. In 1967 the school district granted him a two-year leave of absence. The leave was subsequently extended for an additional three years, to expire on January 1, 1973.

In June of 1971, while petitioner was a member of the Erie County Legislature, he was convicted in the United States District Court for the Western District of New York of the crime of conspiracy to promote and facilitate the promotion of bribery, a felony under 18 U.S.C. § 371. He was sentenced to a term of imprisonment of three years.

On December 22, 1972 petitioner was released from prison on parole. On December 29, 1972 he wrote to the school district stating that his leave of absence was about to expire and that he was ready to resume his duties as a teacher. The school district replied by a letter dated January 24, 1973 informing him that he was assigned to Wilson Elementary School, effective February 1, 1973, the beginning of the new school term.

On January 24, 1973, upon learning of this assignment, the Commissioner of Education wrote to petitioner ordering him to show cause on February 15, 1973 at a hearing why his teaching certificate should not be revoked, pursuant to § 305(7) of the Education Law, as a consequence of the conviction which created substantial doubt as to his fitness to teach in the public schools. A separate letter to plaintiff's counsel stated that the hearing would be conducted before a hearing officer in accordance with "established administrative procedures"; specifically, that petitioner would be afforded the opportunity to present evidence in his behalf and to cross-examine witnesses; and that a stenographer would be present to prepare a transcript of the proceedings.

In a further separate letter dated January 24, 1973 the Commissioner ordered the school district not to re-employ petitioner pending the outcome of the February 15 hearing. The school district advised petitioner of this fact on January 30, 1973.

Petitioner refused to comply with the hearing procedure. At his request the hearing was adjourned until March 30, 1973. On March 8, he commenced this action in the District Court. The Commissioner is and has been at all times prepared to go forward with the hearing. The school district asserted that it was prepared to immediately re-employ petitioner, without a hearing, despite his conviction and parole status. Although nominally a defendant in

the action, the school district joined in petitioner's application for immediate reinstatement. The school district has not appeared in any court proceeding since that time.

Before the District Court, petitioner contended that Section 305(7) violated his right to due process because it was vague and indefinite and procedurally defective; violated the equal protection clause; and was overbroad and potentially chilling of his First Amendment rights.* Applying the standards of *Goosby* v. *Osser*, 409 U.S. 512 (1973), the District Court concluded that petitioner's claims were either foreclosed by previous decisions of this Court or obviously without merit and refused to convene a three-judge court. Since the complaint failed to present a substantial federal question which would support the Court's jurisdiction under 28 U.S.C. § 1343(3), the complaint was dismissed. The Court of Appeals affirmed.

Reasons for Denying the Petition for Certiorari

Petitioner has failed to present any factor which would motivate the exercise of this Court certiorari jurisdiction.

Since the courts below found petitioner's claims either foreclosed by previous decisions of this Court or obviously without merit, *a fortiori* they failed to present a substantial federal question, and the complaint was dismissed without the necessity of convening a three-judge court. *Goosby* v. *Osser, supra; Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Ex Parte Poresky*, 290 U.S. 30 (1933). Petitioner now asserts that this decision was erroneous. On the contrary, the state respondents suggest that petitioner's contentions are frivolous and fail to suggest any factor which

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* Petitioner has not pursued his First Amendment claim in this Court.

would motivate the exercise of this Court's certiorari jurisdiction.

a. Since petitioner received notice of the charge against him and was provided with an opportunity for a hearing, with statutory provision for judicial review from an unsatisfactory ruling (New York Civil Practice Law and Rules, Article 78; *Matter of Lynch* v. *Nyquist*, 34 N Y 2d 588 [1974], *affg.* 41 A D 2d 363 [3rd Dept. 1973]), his contention that Section 305(7) fails to spell out this administrative procedure in detail is frivolous and presents no basis for certiorari review.* Actually, such procedure has always been accorded when the annulment of certification or other disciplinary procedure is involved (A. 56-57).** Moreover, since the decision below, the Commissioner has adopted a regulation setting forth the procedure to be used in certification annulment proceedings, including situations wherein a teacher has been convicted of a crime (reproduced in the appendix to this brief, effective September 1, 1974). The suggestion that the Commissioner might not accord to others similarly situated the same due process protection offered to petitioner is refuted by this regulation, apart from petitioner's obvious lack of standing to raise the issue. E.g., *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166 (1972).

b. Since this Court as recently as *Arnett* v. *Kennedy*, —— U.S. ——, 94 S. Ct. 1633 (1974), has had occasion to discuss and approve statutory language applicable to the

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* Whether as a matter of due process a hearing is required when a teacher is convicted of a crime of moral turpitude, as here, is itself questionable. *Purifoy* v. *State Board of Education*, 30 Cal. App. 3d 187, 196 Cal. Rptr. 201 (Ct. of App., First District 1973). Here the State does provide a hearing, as was offered to petitioner.

** See also *Matter of Quinn*, 67 N.Y. St. Dept. Rep. 7 (1946); *Matter of Hoffman*, 39 N.Y. St. Dept. Rep. 346 (1930); *Matter of Pryor*, 38 N.Y. St. Dept. Rep. 115 (1928).

removal of government employees, similar to the language of the statute challenged herein ("upon cause shown to his [the Commissioner's] satisfaction"), no occasion for further review is presented in this case. Apart from *Arnett*, as the courts below noted, this Court has on numerous occasions upheld statutory language similar to that of Section 305(7). *Beilan* v. *Board of Education*, 357 U.S. 399 (1958) (discharge of a teacher for "incompetency"); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938) (termination of a teacher for "incompetency, insubordination, neglect of duty, immorality . . . or other good or just cause"); *Lehman* v. *Board of Accountancy*, 263 U.S. 394 (1923) (cancellation of an accountant's certificate "for any unprofessional conduct of the holder of such certificate, or for other sufficient cause"). Cf. *Perry* v. *Sinderman*, 408 U.S. 593 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

Petitioner's reliance on *Parker* v. *Levy*, —— U.S.——, 42 U.S.L.W. 4979 (June 18, 1974) is misplaced. There this Court held that provisions proscribing "conduct unbecoming to an officer" and "all disorders and neglect to the prejudice of good order and discipline in the armed forces" were not vague when interpreted in light of custom and usage. 42 U.S.L.W. at 4982-84. This decision directly supports the state respondents' contention that custom and usage, as well as common sense, compel the conclusion that a teacher is chargeable with the knowledge that a felony conviction may be "cause" for the annulment of his teaching certification. Since petitioner's conduct fell within the "hard core" of prohibited conduct for teachers, he lacks standing to attack the statute as it might be applied to others. *Parker*, 42 U.S.L.W. at 4986; *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 578-80 (1973); *Broadrick* v. *Oklahoma*, *supra* at 608.

c. Similarly, the equal protection argument based on state statutes which spell out misconduct definitions and disciplinary procedures for other professions different

than those set forth for teachers is frivolous. Petitioner's argument rests on the assumed equivalence between teaching and other state regulated professions. The assumption is clearly unwarranted. See *Tigner* v. *Texas,* 310 U.S. 141, 146-47 (1940). Education is "perhaps the most important function of state and local government." *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954). The Court of Appeals accordingly recognized that

> ". . . the teaching profession differs from these other professions in many respects, including the special vulnerability of the client population, the high duty of care owed by the state to that group, and the unique responsibility which the state has to provide an effective system of education." (citing Art. 11 § 1 of the New York State Constitution) (A. 48).

See *Beilan* v. *Board of Education, supra* at 405; *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952); *In re Grossman,* 127 N.J. Super. 13, 316 A. 2d 39, 48-49 (App. Div. 1974).

The principle that a state may deal differently with different groups so long as the distinctions drawn are rationally related to a legitimate state interest is well-established. E.g., *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973); *Lindsay* v. *Normet,* 405 U.S. 56, 70 (1972); *Richardson* v. *Belcher,* 404 U.S. 78, 81-84 (1971); *McGowan* v. *Maryland,* 366 U. S. 420, 425-27 (1961).

4. The power to suspend petitioner pending his re-employment by the school district is supported by state statute. New York Education Law §§ 305(7), 308. Indeed it would have been anomalous and perhaps condemnatory had the Commissioner failed to take temporary action to prevent the re-employment of a convicted felon as an elementary school teacher, without so much as a hearing. The Court of Appeals rejected petitioner's claim that he was entitled to a full evidentiary hearing before he could be

suspended (A. 42-45). This is so* apart from this Court's decision in *Arnett, supra,* upholding termination with an opportunity for a subsequent hearing.**

As the various opinions in *Arnett* indicate, the purpose of preliminary due process is the establishment of probable cause for the charges, the intention of which is the avoidance of mistakes in fact. See also *Morrissey* v. *Brewer,* 408 U.S. 471, 490 (1973). No such risk of error was attendant in petitioner's situation. The uncontested fact of petitioner's felony conviction was in and of itself probable cause for a charge that his fitness to teach was in question. Since petitioner was offered a reasonably immediate hearing based on unquestionable probable cause, there is no basis for certiorari review of his claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, August 20, 1974.

Respectfully submitted,

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* E.g., *Weiss* v. *O'Hara,* —— F.Supp. ——, 73 Civ. 264 (S.D. N.Y.) (three-judge court) (May 18, 1973), upholding the suspension procedures of Section 75 of the New York Civil Service Law.

** In *Arnett* a government employee was *removed* from his job. In the instant case petitioner was *temporarily suspended* from *re-employment.*

Appendix

Amendment to the Regulations of the Commissioner of Education

Pursuant to Sections 207, 305 and 3004 of the Education Law

The Regulations of the Commissioner of Education are amended by the addition of a new Part 83, effective Septem 1, 1974, to read as follows:

PART 83

Determination of Good Moral Character

Section 83.1 Determination of good moral character. Any information indicating that an individual holding a teaching certificate or an applicant for a teaching certificate has been convicted of a crime or has committed an act which raises a reasonable question as to his moral character, shall be referred to the director of the division of teacher education and certification.

83.2 Investigation. The director of the division of teacher education and certification shall investigate the circumstances surrounding such conviction or act, and shall submit a report of his findings and recommendation to the teacher education, certification and practice board or to a subcommittee of such board, composed of no less than five members approved by majority vote of the board, to consider such reports.

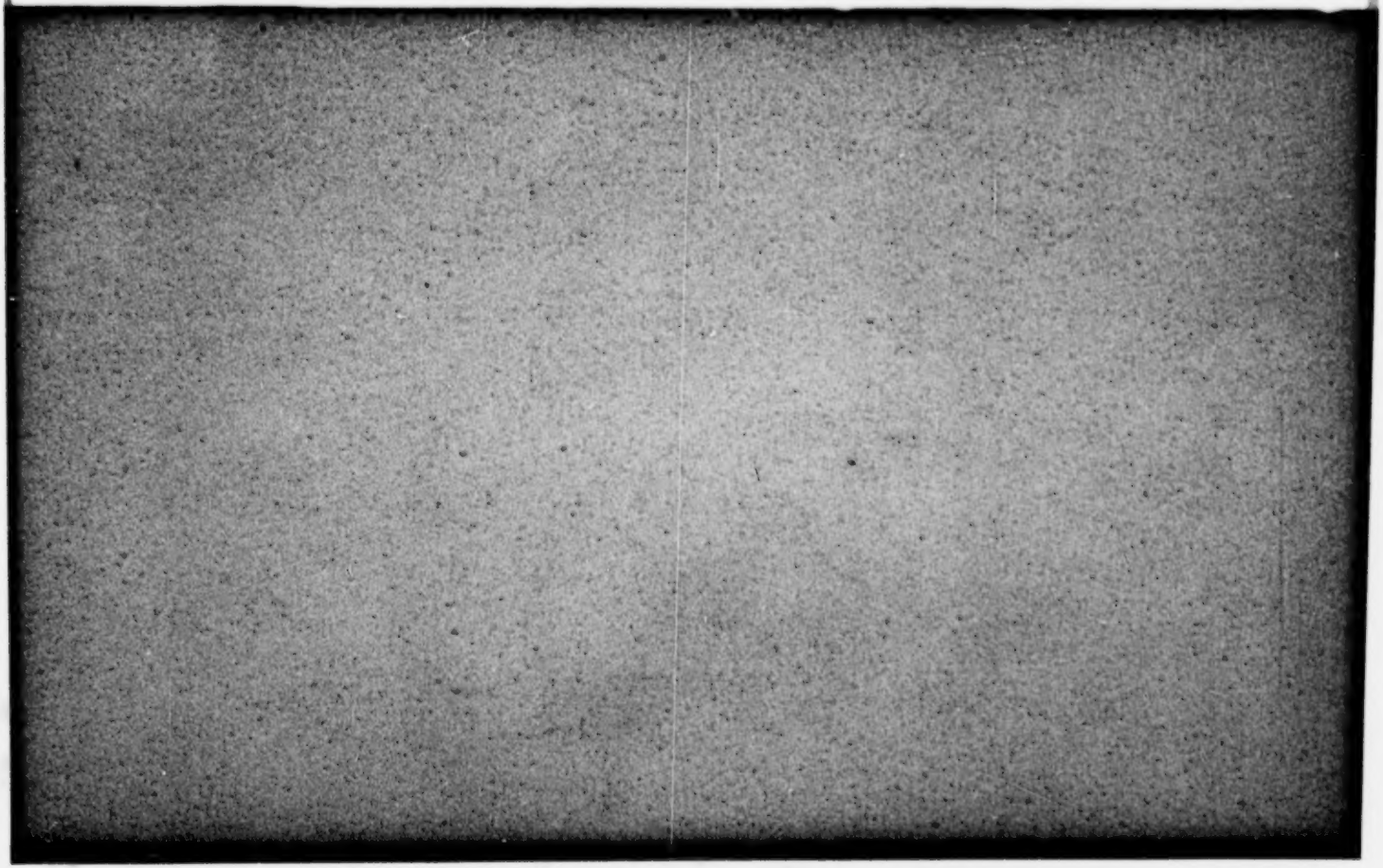
83.3 Review by board. If upon review of the report of the director of the division of teacher education and certification such board or subcommittee concludes that a certified individual's moral character is adequate to permit his continued certification as a teacher, or that an applicant's

moral character is adequate to permit his certification as a teacher, a report to this effect shall be forwarded by the board or subcommittee to the director of the division of teacher education and certification. If upon such review, the board or subcommitee concludes that a substantial question exists as to the moral character of a certified individual or an applicant, notice of the basis for this conclusion and a copy of this part shall be given to the certified individual or applicant.

83.4 Hearing. If requested by the certified individual or applicant, in writing to the director of the division of teacher education and certification within 30 days after receipt of said notice that a substantial question exists as to his moral character, a hearing shall be held to determine whether the individual's certification should be revoked or whether the application for certification should be denied. In the request for a hearing, the certified individual or applicant may request that the hearing be held solely before a hearing officer or in the alternative, before a hearing officer and a three member hearing panel. Upon receipt of a request for a hearing, a hearing officer shall be appointed by the Commissioner and a hearing scheduled. The certified individual or applicant shall be given not less than 15 days notice by mail of the time and place of the hearing. If a hearing panel has been requested, the members shall be selected in the following manner from the list maintained by the Commissioner pursuant to the provisions of Education Law, Section 3020-a: one member shall be selected by the certified individual or applicant, one member shall be selected by the teacher education, certification and practice board or a subcommittee thereof and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the Commissioner. The certified individual or applicant may be represented at the hearing by counsel and may produce witnesses and affidavits in proof of his

good moral character. In the case of a certified individual, the Department or the complaining party shall have the burden of proof of lack of good moral character. The hearing officer shall conduct the hearing and may administer oaths. A verbatim record shall be kept of the testimony. Upon the conclusion of the hearing, the hearing officer shall submit to the Commissioner and to the certified individual or applicant a report of his findings and conclusions or, if a hearing panel has been utilized, a report of the findings and conclusions of such panel, together with a copy of the transcript. The conclusions of the hearing officer or the hearing panel shall be based solely upon the record in the proceeding and shall set forth the factual basis therefor. The fact of conviction of a crime shall not in and of itself create a presumption that the person convicted lacks good moral character.

83.5 Appeal. If the hearing officer or hearing panel finds a substantial question as to moral character and concludes that an inidividual's certificate be annulled or that an applicant's request for certification be denied, the certified individual or applicant may file an appeal, within 30 days after the receipt of notification of such conclusion, with the Commissioner, who shall review the transcript and all evidence presented in the proceeding. Based upon the record the Commissioner may affirm, reverse or modify the findings and conclusions of the hearing officer or the hearing panel. If the Commissioner determines to deny an application for certification, he shall communicate his decision to the applicant. If the Commissioner determines to annul a certificate, he shall execute an order to that effect and shall have the order served upon the certified individual. If no appeal is taken by a certified individual or applicant within the time prescribed in this section, the conclusion of the hearing officer or the hearing panel shall be final and in the case of an annulment of a certificate, the Commissioner shall issue an order to that effect.



SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73—1963

FREDERICK F. PORDUM,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK and EWALD B. NYQUIST, the Commissioner of Education of the State of New York, and the CITY SCHOOL DISTRICT OF THE CITY OF LACKAWANNA,

Respondents.

Brief of Petitioner in Reply to Opposing Brief of Respondents, Board of Regents and Commissioner of Education.

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IN THE

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FREDERICK F. PORDUM,

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BOARD OF REGENTS OF THE STATE OF NEW YORK AND EWALD B. NYQUIST, THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, AND THE CITY SCHOOL DISTRICT OF THE CITY OF LACKAWANNA,

Respondents.

Brief of Petitioner in Reply to Opposing Brief of Respondents, Board of Regents and Commissioner of Education.

Petitioner Frederick F. Pordum respectfully submits this brief in reply to the opposing brief of respondents Board of Regents and Commissioner of Education.

Reply.

Referring to page 6 of respondent Commissioner's brief in opposition, petitioner Pordum notes that, instead of having any statutory or regulatory basis for hearings, the respondent Commissioner of Education has proceeded on an entirely *ad hoc* basis in the instant case. There has been no proof put forth by any respondent that the statutory and regulatory procedures for holding teacher tenure hearings by boards of education are ap-

plicable to the respondent Commissioner of Education. A reading of *Education Law* §3020-a makes this abundantly clear. Indeed, the Commissioner of Education has found it necessary to promulgate regulations to rectify the procedural deficiencies of *Education Law* §305(7), viz. respondent Commissioner's brief in opposition, "Appendix."

A review of the "Appendix" attached to respondent Commissioner's brief is also illuminating since it is *effective September 1, 1974, and is therefore prospective* in nature. Respondent Commissioner notes at page 9 of his brief:

> "The uncontested fact of petitioner's felony conviction was in and of itself probable cause for a charge that his fitness to teach was in question."

At page 7, respondent Commissioner states that "* * * petitioner's conduct fell within the 'hard core' of prohibited conduct for teachers * * *." Petitioner Pordum submits that this is erroneous, for the Commissioner, at page 15 of his brief, states in his new regulations (83.4):

> "The fact of conviction of a crime shall *not* in and of itself create a presumption that the person convicted lacks good moral character." [Italics supplied.]

This new regulation seems to have heeded the warning implicit in footnote 14 of the decision of the Court of Appeals below (Petition, p. 49), which stated:

> "If the hearing were to proceed in this manner, with the irrebutable presumption that a person who has been convicted of committing a crime and who is on probation is unfit to teach in the public schools, it might raise serious constitutional difficulties."

These new regulations still do not satisfy due process requirements. The statute remains vague, for the regulations promulgated fail to delineate the conduct to be proscribed. The constitutionality of the statute still sets forth a substantial question requiring a three-judge court. *Goosby v. Osser,* 409 U. S. 512 (1973).

For the foregoing reasons and those made clear in the petition for a writ of certiorari, this Court should both hear and remand the instant case to be heard before a three-judge court.

Dated: August 29, 1974

Respectfully submitted,

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CERTIORARI DENIED